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ALEXANDER L. STEVAS,
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80-1461

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

CLEAR PINE MOULDINGS, INC.,

Petitioner

- against -

NATIONAL LABOR RELATIONS BOARD,

Respondent

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR

THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether petitioner, which, during several negotiating sessions discussed a number of economic issues with the union, responded to the union's request to extend the current labor agreement with an offer of an interim agreement, negotiated for several meetings on the terms of an interim agreement, provided the union with legitimate reasons for not accepting wage and fringe benefit rates based on those of another industry, could properly be found to have refused to bargain collectively with the union.

2. Whether petitioner refused to bargain collectively with the union when it obtained identical benefits from a private insurance carrier after the trustees of the health and welfare trust under the expired contract refused to continue to accept the same level of contributions, after petitioner discussed with the union the need to select a different carrier, and after petitioner received no objections or counter proposals from the union.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. _____

CLEAR PINE MOULDINGS, INC., Petitioner,

- against -

NATIONAL LABOR RELATIONS BOARD, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Clear Pine Mouldings, Inc., Petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit enforcing an Order of the National Labor Relations Board entered on July 25, 1980.

OPINIONS BELOW

On September 12, 1978 the National Labor Relations Board entered a Decision and Order holding Petitioner in violation of Sections 8(a)(1), (3) and (5) of the National Labor Relations Act, 29 U.S.C.. §§ 158(a)(1), (3) and (238 NLRB No. 1) [Appendix "A" infra]

On July 25, 1980, the United States Court of Appeals for the Ninth Circuit enforced the Board's Decision and Order (632 F2d 721) [Appendix "B" infra].

JURISDICTION

A timely petition for rehearing of the Court of Appeals' decision was denied on November 24, 1980. [Appendix "C" infra] This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner, which, during several negotiating sessions discussed a number of economic issues with the union, responded to the union's request to extend the current labor agreement with an offer of an interim agreement, negotiated for several meetings on the terms of an interim agreement, provided the union with legitimate reasons for not accepting wage and fringe benefit rates based on those of another industry, could properly be found to have refused to bargain collectively with the union.

2. Whether petitioner refused to bargain collectively with the union when it obtained identical benefits from a private insurance carrier after the trustees of the health and welfare trust under the expired contract refused to continue to accept the same level of contributions, after petitioner discussed with the union the need to select a different carrier, and after petitioner received no objections or counter proposals from the union.

STATUTE INVOLVED

Sections 8(a)(5) of the National Labor Relations Act (29 U.S.C. § 158(a)(5));

> "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees . . ."

STATEMENT OF THE CASE

The only aspects of the decisions below which are before this Court are two separate violations of Section 8(a)(5). The first is the finding that Petitioner did not bargain in good faith with the certified union during the parties' negotiating sessions. The second, is the finding that Petitioner's selection of a different insurance carrier violated the Act. The facts underlying the alleged violations are interrelated and not in dispute.

Petitioner manufactures wood mouldings and related products in Prineville, Oregon. In 1965, Local 3-200 of the International Woodworkers of America, was certified as the collective bargaining representative of Petitioner's employer. The last collective bargaining agreement between petitioner and the union ran from June 1, 1975 - May 31, 1977. By a letter dated March 14, 1977 the union opened contract negotiations. A supplementary letter followed on March 31, 1977. On May 16, 1977 the parties met for the first time, at which point the union outlined its opening demands.

At this first meeting petitioner objected to the union's general wage and fringe benefit demands on the ground that

its competitors would not be reaching agreement for several months and if these competitors ended up with lower wage and benefit rates petitioner would be in a disadvantageous economic position. In fact, said petitioner's representatives, this is exactly what had happened in 1975 when rival moulding firms settled for less than petitioner.

At a second meeting on June 9, 1977 the union presented its so-called "industry settlement" figures for wages and health, welfare and pension plan contributions. At this time, petitioner objected to being linked to the large logging, lumber and plywood industry rather than its own moulding industry, and asked if the union would wait until petitioner's moulding industry competitors in Northern California had reached a settlement, since it did not wish to find itself in the same position as it had been in 1975.

The third meeting, held on June 24, 1977, witnessed a discussion wherein petitioner said it did not wish to pay the higher health, welfare and pension rates previously agreed to by the logging, lumber and plywood employers, but was agreeable to continuing the current rates. The union continued to insist on the new rates adopted by the large wood products industry employers. In addition, pay for new and changed classifications and modification of the vacation clause to allow employees to draw their vacations in pay were discussed.

And it was here at this third meeting that the concept of a contract of limited duration was first raised. Significantly, the idea was raised by the union. The union initially suggested the contract had not been terminated because the union had delivered only a notice of modification. When petitioner responded that this was not an accurate interpretation of existing law, the union inquired whether petitioner would be interested in an extension of the current contract to be effective "until impasse." The company, while rejecting the concept of an extension "until impasse," did inquire whether the union would be interested in a short term or interim agreement for a specific period. The union neither accepted nor rejected the company's suggestion, although it did ask a number of questions concerning what the terms of such an agreement would be. Petitioner's intention in discussing the interim agreement with the union, of course, was to accommodate the union's desire for continuation of the contract and also its own desire to see what its competitors settled on.

At the fourth meeting on July 8, 1977, petitioner presented to the union a written interim agreement containing four items, one of which provided for the 1975-1977 collective bargaining agreement to be continued for 60 days and thereafter until either party gave ten days notice of termination. Another item (Item 3) proposed that all general wage increases finally agreed upon would be retroactive to June 1, 1977.

This interim agreement proposal was rejected by the union, primarily because petitioner refused to accede to the union's demand for a union shop. The meeting adjourned with the union stating "if and when" another meeting took place, it would be with a federal mediator. After this meeting, the union filed its unfair labor practice charge claiming that the Company had "refused to make an offer . . ."

A fifth meeting on July 26--the last meeting before the union went on strike--was devoted to offers and counteroffers on a proposed form of interim agreement. Petitioner proposed a specific expiration date of October 1. Petitioner also offered to provide alternate health and welfare coverage if it became impossible to do so through the then current trust, and to bank in a pension trust account the contributions which the trust would no longer accept at the previous rate. The union made a seven point counteroffer, accepting petitioner's proposal as to the October 1 termination date, vacation options, changed job classifications, and retroactivity of wage increases to June 1, 1977. Petitioner accepted five of the union's seven points, rejecting only two: an illegal demand that revocations of checkoff authorization not be recognized by the company and the demand that petitioner accept the wood products industry settlement on health and welfare and pension. After the parties deadlocked on these two issues, the meeting adjourned with no mention of strike

action by the union and with the next negotiating session scheduled for August 2.

Petitioner and the union continued to meet, despite the union's calling a strike. On August 2, the day after the strike began, the parties met. However, there was no progress at that meeting. The union presented a substantially different proposal for a one-year agreement including, for the first time, items which had not been included in their opening demand or even mentioned in prior negotiation sessions. The proposal was made on the basis of "take it in its entirety or we will withdraw it." The company rejected the union's proposal and suggested its willingness to examine still a different form of interim agreement, including an agreement with a three-year term. The union responded that it was not interested in either an interim agreement or a three-year agreement. The federal mediator, concluding that a deadlock existed and that agreement did not appear possible, adjourned the meeting without scheduling further negotiations.

Further negotiating sessions were called by the federal mediator in September, October and December. No progress was made toward settlement, but a number of issues were discussed. On October 14, the company made a one-year proposal including an eight per cent wage offer. One item as to which the Union's position remained adamant through all negotiating sessions was its insistence on increasing health and welfare and pension contributions to the level of

the so-called industry settlement. At no time during any of these negotiations did the union alter its adamant insistence on the "industry settlement" on health and welfare and pensions.

During the negotiations petitioner was advised by the health and welfare trust that it would no longer accept contributions from it since they differed from those currently being made by employers in the logging, lumber and plywood industry. Subsequently, the trust agreed to a "one-month only" extension during which petitioner continued to make payments to the trust. After that petitioner purchased substitute covering from Aetna, a private insurance carrier. The benefits were exactly the same. Since the trust would no longer accept contributions from petitioner at the "old" rate after the one month extension expired petitioner had no choice but to make those contributions to another carrier which would agree to provide the same benefits as before.

In the face of these undisputed and not very extraordinary facts, the Board found petitioner guilty of two distinct violations of the Act. The Court below enforced the Board's order by essentially failing to address the issues. As to the first alleged violation, that of refusal to bargain in good faith, the Court below simply side-stepped the issue by "deferring" to the Board:

> "Oftentimes it is difficult to determine whether an employer's conduct amounts to hard bargaining or an unwillingness to bargain in good faith. The validity of any such determination depends in part on an understanding of the collective bargaining process. Therefore, the Board's determination as to a party's bargaining bad faith, if supported by substantial evidence, must stand." NLRB v. Dent, 534 F2d 844, 846 (9th Cir. 1976)
>
> (Slip opinion, p. 14)

As to the issue of "unilateral change" of insurance carriers, the Court recognized that petitioner was in a "tight spot" and had to make a decision. Inexplicably, it went on in the same paragraph to affirm the Board's finding of refusal to bargain (Slip opinion, p. 17).

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW DIRECTLY CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS.

In upholding the Board's decision that Petitioner did not bargain in good faith with the Union, the Court below has put itself in direct conflict with at least three other Courts of Appeals. The Court's decision is based on only one point--petitioner's alleged failure to make any "specific economic proposals" until the eighth meeting in October (Slip opinion, p. 15). However, the undisputed evidence does not support the finding. It is undisputed that petitioner conceded, as early as the second meeting, that it expected to grant a reasonable wage increase and, at the fourth meeting, petitioner proposed that any such wage increase would be retroactive to the first day of the new contractual period.

Aside from these matters--which are certainly both "specific" and "economic" by anyone's standard--the fact remains that even if petitioner had been unwilling to grant any wage increase, such adamance would not be, in itself, evidence of bad faith. N.L.R.B. v. Herman Sausage Co., 275 F2d 229 (5th Cir. 1960); White v. N.L.R.B., 255 F2d 564 (5th Cir. 1958); N.L.R.B. v. Cummer-Graham Co., 279 F2d 757 (5th Cir. 1960).

In Herman Sausage, White and Cummer-Graham the adamance of the employers led the Board in each case to find a violation of good faith bargaining. The Fifth Circuit Court of Appeals, in each case, refused to enforce the Board's order, finding no lack of good faith merely because of such adamance.

There are, of course, cases in which a finding of bad faith is justified. Examples of such cases are found in cases decided by the First and Second Circuits. Continental Ins. Co. v. N.L.R.B., 495 F2d 44 (2nd Cir. 1974); Vanderbilt Products Inc. v. N.L.R.B., 297 F2d 833 (2nd Cir. 1961); N.L.R.B. v. Reed & Prince Mfg. Co., 205 F2d 131 (1st Cir. 1953). The circumstances of those cases are light years away from the undisputed facts of the case before this Court. In the Second Circuit cases, the Court upheld the Board's finding of bad faith because it found the employer's proposal (in Continental Insurance) to be "so inadequate as to be patently disingenuous" and (in Vanderbilt) that the proposal could not have been made "with a straight face." And, in Reed & Prince the First Circuit said:

"It is true, as stated in N.L.R.B. v. American National Ins. Co., 1952, 343 U.S. 395, 404, 72 S. Ct. 824, 829, 96 L.Ed. 1027, that the Board may not 'sit in judgment upon the substantive terms of collective bargaining agreements.' But at the same time it seems clear that if the Board is not to be blinded by empty talk and by the mere surface motions of collective bargaining, it must take some cognizance of the reasonableness of the positions taken by an employer in the course of bargaining negotiations. See Wilson & Co., Inc. v. N.L.R.B., 8 Cir., 1940, 115 F2d 759, 763. See also Smith, The Evolution of the 'Duty to Bargain' Concept in American Law, 39 Mich. L. Rev. 1065, 1108 (1941). Thus, if an employer can find nothing whatever to agree to in an ordinary current-day contract submitted to him, or in some of the union's related minor requests, and if the employer makes not a single serious proposal meeting the union at least part way, then certainly the Board must be able to conclude that this is at least some evidence of bad faith, that is, of a desire not to reach an agreement with the union. In other words, while the Board cannot force an employer to make a 'concession' on any specific issue or to adopt any particular position; the employer is obliged to make some reasonable effort in some direction to compose his differences with the union, if §8(a)(5) is to be read as imposing any substantial obligation at all." (at pp. 134-135) (emphasis added)

The law in this area--at least until the decision of the Court below--appears to be fairly summarized as follows:

"It appears fair to say, however, that in those cases in which the Board has based a finding of bad faith upon the employer's substantive position at the bargaining table, the employer is insisting upon a set of terms which would place the employees and the union in a worse (or no better) economic position than had there been no contract at all--thereby demonstrating a desire to penalize the employees, or undermine the union or reject collective bargaining. Moreover, this is usually accompanied by a refusal to offer serious and specific reasons for the employer's position or by an admission

> (either during negotiations or before the Board) that certain requests of significance for the union could be granted at no additional cost to the employer." (italics added)
> Gorman, Labor Law (1976), p. 489

If the circumstances which will support a finding of "bad faith" are relatively clear, it is equally clear that the facts of this case are totally unlike those circumstances. In this case the undisputed facts show that the parties met four times before the charge of "bad faith" was filed by the union. During those meetings a discussion of "local openers" occurred at the first meeting, followed by give and take discussions relating to the union's presentation of the so-called "industry settlement" concerning wages and health, welfare and pension contributions by the employers, reference by petitioner to the fact that the union was relying on the wrong industry's economic settlement, the reluctance of petitioner to be first to agree to an economic package in its own industry (as it had been in 1975 to its detriment), and discussion of both the "concept" and specific terms of an interim agreement.

At the fifth meeting the parties actually agreed to five out of seven items previously in dispute. Since one of the items demanded by the union was illegal (refusal to recognize employee cancellation of prior checkoff authorizations), the only legitimate stumbling block to agreement at this time was the union's demand and petitioner's rejection of the fringe benefit settlement in the logging, lumber

and plywood industry. In other words, had petitioner agreed to the "industry" agreement with respect to fringe benefits and had the union withdrawn its patently illegal checkoff proposal, the interim agreement would have been accepted by both sides--at the fifth meeting of the parties. Given the circumstances, it is incredible that the Board and the Court below tagged one of the parties--especially petitioner--with the label of "bad faith."

The second portion of the decision below, the finding of a violation based on petitioner's selection of a new insurance carrier to provide health and welfare benefits to its employees after the former trustees refused to accept any more contributions from petitioner, is also in direct conflict with the Second Circuit. Connecticut Power & Light Co. v. N.L.R.B., 476 F2d 1079 (2nd Cir. 1973).

In Connecticut Power the Court held that the failure of the employer to bargain on the selection of the carrier did not constitute a violation of Section 8(a)(5) when it had bargained on all the other issues of employee health insurance. Holding that the choice of a carrier was not a mandatory subject of bargaining in the context of the facts of that case the court upheld the right of the employer to select its own carrier when such selection would have no effect on the "terms and conditions" of the already agreed-to coverage itself. That is precisely the situation in the present case. The petitioner had guaranteed the union--and stipulated

to the insurance carrier--that the coverage would be identical. No purpose whatsoever would have been served by bargaining over the identity of the carrier. If petitioner had failed to obtain a substitute carrier, there would simply have been no coverage for petitioner's employees. The Board's order--enforced by the Court--would impose a meaningless and senseless obligation upon employers caught in a similar position. Had this case arisen in the Second Circuit, there is no doubt what the result would be. Given the failure of the Court below to articulate any policy why a different result should obtain in the Ninth Circuit, petitioner submits that the conflict should be resolved pursuant to the analysis in Connecticut Power.

II. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS

Over the years, pattern bargaining (including the use of interim agreements) has been recognized as a basic approach to collective bargaining by both the National Labor Relations Board and the Courts. For the first time, the Court below has called the practice into question and, indeed, has condemned a party to the negotiations for merely proposing that the pattern in the industry be taken into consideration. Under this decision, either party to a negotiation--union or employer--will proceed at its peril in suggesting the relevance of competitive wage rates and benefits, and the collective bargaining process will be the loser.

Significantly, this is not a case where a party insisted upon tying demands to future settlements elsewhere. Petitioner in this case merely proposed doing so. However, even had petitioner been intransigent on the subject, the settled law--until this Court's decision--is that no violation of the NLRA would be made out.

For example, in Charles E. Honaker, 147 NLRB 1184 (1964), the alleged violation was the company's position "essentially that it was unwilling to pay more in wages and other economic benefits than was being paid by the operators of other service stations in the surrounding area." 147 NLRB at 1188. The Board held this was no violation:

> "[The] Respondent is legally entitled to take the position that it will pay no more than the area wage scale. Without question in so doing it is engaging in hard bargaining, but on the basis of the evidence before us, we are unable to conclude that such bargaining was motivated by bad faith on behalf of the Respondent." 147 NLRB at 1188.

This same theme has been echoed by the Courts and the Board on many other occasions. United Mine Workers v. Pennington, 381 U.S. 657, 665, n.2 (1965); General Teamster, Local 126, 176 NLRB 406 (1969); Dolly Madison Industries, Inc., 182 NLRB 1037 (1970). In Pennington, the Supreme Court held that a union may lawfully seek to obtain the same wage rates from all employers in an industry. In General Teamster, the Board followed Pennington and approved a proposed provision to the effect that if a subsequent wage

settlement elsewhere was higher, the present contract would be increased accordingly. And in Dolly Madison the Board held that an employer could insist to impasse on a "most favored nations clause" tying the present contract to future settlements elsewhere. Dolly Madison established--if there was ever doubt--that pattern bargaining is a two-way street, available to employers as well as unions.

The text writers have also recognized pattern bargaining as an integral part of the collective bargaining process. For example, in H. Davey, Contemporary Collective Bargaining (3d ed. 1972) at 256, the author notes:

> "Employers do not like to be too far apart from their fellow employers on wage policy, no matter how competitive they consider themselves to be. Unions are also motivated to 'keep up with the Joneses.' The union leader's constituents keep careful tabs on whether he is doing as well for them on wages and other key economic issues as other unions appear to be doing for their membership.
>
> "Pattern-following is also highly visible on such matters as the length of contracts."

And in E. Marting, Understanding Collective Bargaining (1953), the author points out the importance of a comprehensive knowledge of rates of pay, fringe benefits, other economic benefits, and other economic provisions of local industry and--equally important--all industry.

> "If the economic provisions of a company's labor contract are substantially greater than those of competition, it is hardly necessary to point out that the future of the company and the employees is hazardous and that extraordinary compensations must be relied upon."

Now, without so much as a nod in the direction of this mass of authority, and with only a sidelong--and misleading--reference to Pennington (Slip Opinion, p. 14), the Court below has treated this established and accepted concept as suspect, improper and illegal. The speed with which the opinion hastens to its conclusion makes it unlikely that the Court below considered the enormous impact its decision would have on collective bargaining. Certainly no such consideration is apparent in the opinion. If the Court below really intended to establish a new doctrine in the law, the holding certainly deserved more attention than the Court's decision afforded it. By condemning petitioner's proposal that subsequent negotiations between other parties be considered, the Court below has effectively eliminated a long accepted bargaining approach. If the Court's opinion is not overturned by this Court it can only have a grave, chilling effect upon the collective bargaining process.

WHEREFORE, Petitioner respectfully prays that a Writ of Certiorari issue to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

NEWCOMB, SABIN, MEYER & SCHWARTZ

Verne W. Newcomb
Attorney for Petitioner

PROOF OF SERVICE

I, VERNE W. NEWCOMB, Attorney for Petitioner and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served three copies of the foregoing Brief for Petitioner on Elliott Moore, Attorney for Respondent, by mailing said copies, via Air Mail, postage pre-paid, addressed to his office at 1717 Pennsylvania Avenue, N.W., Washington, D.C. 20570.

DATED this _____ day of February, 1981.

_____
VERNE W. NEWCOMB
Attorney for Petitioner

APPENDICES

Appendix "A" - Decision and Order of the National Labor Relations Board dated September 12, 1978

Appendix "B" - Opinion of the Court of Appeals filed July 25, 1980

Appendix "C" - Order of the Court of Appeals filed November 24, 1980, denying Petition for Rehearing

APPENDIX A.

DECISION AND ORDER

On June 14, 1978, Administrative Law Judge James M. Kennedy issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief. The General Counsel filed a brief in support of the Administrative Law Judge's Decision and a brief in reply to the exceptions and brief filed by Respondent.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1/]

1/ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. Standard Dry Wall Products, Inc., 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

Additionally, we are satisfied that Respondent's contention that the Administrative Law Judge was biased is without merit. In our opinion, there

(continued)

and conclusions[2/] of the Administrative Law Judge and to adopt his recommended Order.

Amended Conclusions of Law

Substitute the following for the Administrative Law Judge's Conclusion of Law 6:

"6. On July 18, 1977, Respondent, by reprimanding Darlene Forseth because she was a member of the Union's committee, violated Section 8(a)(3) and (1) of the Act."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Clear Pine Mouldings, Inc., Prineville, Oregon, its officers, agents, successors, and

1/ is nothing in the record to suggest that his conduct at the hearing, his resolutions of credibility, or the inferences he drew were based on either bias or prejudice.

2/ In finding that Respondent's reprimand of Darlene Forseth violated the Act, we find it unnecessary to determine whether that reprimand was pursuant to art. XX of the contract and whether art. XX became, in essence, a company rule upon the expiration of the contract. The facts reveal that Respondent's written warning issued to Forseth was, as found by the Administrative Law Judge, motivated by antiunion considerations based upon Forseth's membership on an in-plant union committee.

While finding that Respondent's warning to Forseth violated Sec. 8(a)(3) as well as Sec. 8(a)(1), the Administrative Law Judge inadvertently omitted reference to Sec. 8(a)(3) in his Conclusions of Law.

assigns, shall take the action set forth in said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

Dated, Washington, D.C. September 12, 1978

John H. Fanning, Chairman

John A. Penello, Member

John C. Truesdale, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

6-14-78

JD-(SF)-144-78
Prineville, Oreg.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

CLEAR PINE MOULDINGS, INC.

and

Case No. 36-CA-3129

INTERNATIONAL WOODWORKERS OF AMERICA,
LOCAL No. 3-200, AFL-CIO

Richard V. Stratton, Esq., Portland,
Oreg., for the General Counsel.
A. C. Roll, Esq., Oceanside, Oreg.,
for the Charging Party.
Verne W. Newcomb, Esq., James B. Ruyle, Esq.,
and Wayne D. Landsverk, Esq., of Newcomb,
Sabin, Meyer & Schwartz, of Portland, Oreg.,
for Respondent.

DECISION

Statement of the Case

JAMES M. KENNEDY, Administrative Law Judge: This case was tried before me on December 6-8, 1977 and January 23, 1978, in Prineville and Portland, Oregon, pursuant to a complaint issued by the Regional Director of the National Labor Relations Board for Region 19 on October 3, 1977. The complaint is based upon a charge filed by International Woodworkers of America, Local No. 3-200, AFL-CIO (herein called the Union) on July 12, 1977 against Clear Pine Mouldings, Inc. (herein called Respondent), alleging that it has engaged in certain violations of Section 8(a)(1),(3) and (5) of the National Labor Relations Act.

Issues

Whether or not:

1. Respondent, on various dates in the spring of 1977 engaged in independent violations of Section 8(a)(1) of the Act.

2(a). Respondent in May, June and July 1977 engaged in dilatory bargaining tactics with the Union, thereby violating Section 8(a)(5).

2(b). If so, whether the dilatory tactics caused the strike of August 1, 1977, 1/ and whether or not the strikers should be held to be unfair labor practice strikers.

1/ All dates hereinafter are 1977 unless otherwise noted.

3. Respondent violated Section 8(a)(5) when, after the expiration of the collective-bargaining agreement, it discontinued payments to the health and welfare and pension trusts and thereafter purchased substitute medical coverage and deposited monies with which otherwise would have been contributed to the pension trust into a separate bank account.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally and to file briefs. Briefs, which have been carefully considered, were filed on behalf of all parties.

Upon the entire record of the case and from my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. Respondent's Business

Respondent admits that it is an Oregon corporation with an office and place of business located in Prineville, Oregon, where it is engaged in the manufacture and sale of mouldings and related products. During the past 12 months it has sold and shipped from its Prineville plant to customers outside Oregon finished products valued in excess of $50,000. It therefore admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

Respondent admits, and I find, that at all times material herein the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. Background and Participants

Respondent operates a manufacturing plant in Prineville, Oregon. It currently employs approximately 330 employees. The Union was certified as the collective-bargaining representative of Respondent's employees in an appropriate unit on August 4, 1965, in Case No. 36-RC-2057. At that time the plant employed only 68 production and maintenance employees. It has since grown to its present size and during that period Respondent has signed a series of collective-bargaining contracts with the Union.

The most recent collective-bargaining contract, which had a duration of 2 years, expired on June 1, 1977. It is the negotiation of a successor agreement which is under scrutiny here.

During the relevant period Respondent's management included General Manager Thomas S. "Stu" Turner, General Superintendent Joel Hensley, and Personnel Manager Robert Lockyear. During the collective-bargaining sessions Respondent

was represented by its attorney , Verne W. Newcomb, Delosh "Dee" Hustead, a professional negotiator employed by Timber Operators Council, Inc., and Turner.

The Union was represented at all meetings by Phillip L. Douglass, its business agent. At the first meeting he was assisted by an IWA regional representative named Les Miller. At later meetings the IWA regional representative was Hugh Kidwell. The union officials were also assisted by a local committee consisting of five of Respondent's employees.

One member of the Union's committee, Darlene Forseth, is an alleged victim of certain independent 8(a)(1) and (3) conduct.

The Union opened the 1975-1977 contract for negotiation of a successor agreement by Douglass' letter of March 14. Attached to that letter were the Union's initial demands. Respondent's General Manager Turner acknowledged receipt of the Union's opening letter, by his letter to the Union dated March 22. By letter dated March 31 Douglass submitted additional matters for negotiation.

B. Alleged Interference; Restraint and Coercion

The 1975-1977 contract between Respondent and the Union, like previous contracts, contained a maintenance of membership union security clause. Many of Respondent's employees had not joined the Union. In March, in order to make certain it had sufficient bargaining strength to successfully negotiate a new contract, the Union began a membership drive among those employees who had not joined. A union meeting was held in late March, approximately March 25. At that time about 40 employees joined the Union and executed dues checkoff authorization forms. Douglass delivered these to Respondent the following Monday.

For a period of time thereafter, other employees also joined the Union and executed dues checkoff forms. These, too, were promptly given to Respondent.

1. Randle and Stephens

Two employees who signed dues checkoffs were Andrew Randle and Laura Stephens. Although the record does not show each date, their checkoff authorization forms were given to Respondent. Immediately after they were received, Personnel Manager Lockyear called each to his office where they were separately interviewed in April.

Randle, a forklift driver, testified Lockyear, saying he had to be careful how he worded it, asked Randle why he had joined the Union. Randle replied that he thought it was necessary for safety reasons. Lockyear also asked Randle if he had heard rumors around the mill. Randle replied that he paid no attention to rumors. The interview then ended.

Stephens, who works in the vinyl department, testified when Lockyear called her in, he told her he had to be careful how he approached her. He then

asked her why, after 8 months of employment, she had joined the Union. She replied she became a member because she wanted to obtain union retirement benefits. Lockyear replied that retirement benefits did not depend on union membership and she and her husband together were throwing away $22 per month on union dues. He then asked her who had approached her about joining the Union and whether the approach had been made on the job. She refused to tell him who had approached her but did say she had not been approached on the job. Lockyear then asked her to have her husband come and see him. She told her husband about Lockyear's request, but he refused to see Lockyear.

Lockyear and General Superintendent Hensley both testified they had heard reports about the union organizing drive which led them to believe employees were being misled about the need for union membership.

Lockyear testified that employees Ron Boothe and Rod Johnson, the day after the union meeting, had told him the meeting had been a fiasco and Boothe had been shouted down. According to Lockyear, Boothe said the Union had made a demand that it needed more membership or it would lose its power; that if it lost its power in negotiating, the Company would do away with all the employees' fringe benefits and lower their wages. Lockyear says Johnson said practically the same thing. Hensley testified Boothe told him the union officials had said if the union membership didn't increase the Union was going to cut wages and drop the fringe benefits. 2/ In addition, Hensley said he received reports from three of his foremen that the Union had told employees that if they didn't join there was a possibility there would be no Union and the Company would cut fringes, wages and do just anything it wanted.

According to Lockyear, it was these reports which triggered his interview of Randle, which he admits. He does not recall interviewing Stephens, though he does not deny the possibility. He says the purpose of the Randle interview was to determine if the Union was obtaining membership by feeding employees misinformation. Presumably that was also behind his interview of Stephens.

Boothe, a glue-press setup man employed for 8 years by Respondent, testified that when he went to the meeting, the union officials, including Phil Douglass and others whom he did not know, listed what the Union's bargaining demands were going to be. Boothe then reports they said if the Union lost its representational rights, Respondent could not match the current medical insurance and could drop wages to the minimum wage and drop some of the holidays. Boothe says that he tried to tell the union officials and membership that Respondent wouldn't do those things because "they just ain't that kind of people . . . ." Every time Boothe tried to say something he was either laughed at or the subject was changed. Boothe readily admitted he was opposed to the Union's continued representation and said he wanted "to see the Union out."

2/ Such a statement by Boothe should have caused Hensley serious doubts about Boothe's accuracy, for he well knew that the Union could not cut wages or fringe benefits; only Respondent could. If Boothe was simply being inarticulate in reporting that the Union, if weak, would be unable to negotiate well, such a remark is above suspicion insofar as the Union's alleged deceptive practices are concerned.

In view of Boothe's antiunion attitude, and in view of the fact that he characterized the union officials' talk as phrased in "could" terms rather than "would" terms, I find Respondent's explanation for the Randle and Stephens interviews to be hollow. It may well have been true that Boothe received a hostile reception from the Union's officials and membership, no doubt because of his own hostility toward the Union. Despite his enmity, he testified that the Union's sales pitch was couched in possibilities, not certainties. Even Hensley seems to have gotten that message because he said he was not certain if Boothe had used the words "could" or "would" in quoting the union officials.

Accordingly, I conclude that shortly after the Union's March organizational meeting, Respondent had no reasonable grounds to believe that the Union was engaging in deceptive organizing practices. It knew that the Union was engaging in simple, hard-sell, organizing techniques and was not engaging in any falsehoods. Accordingly, there appears to have been no legitimate justification for interrogating Randle and Stephens.

2. The Hiring Interview of Kenneth Heitz

Kenneth Heitz was hired on June 7, a week after the collective-bargaining contract expired. He was interviewed by Lockyear who made the decision to hire him. Heitz testified that during the interview Lockyear told him there was a union at Respondent but it would not be to Heitz' advantage to join it. Heitz said Lockyear told him the Company had just as good benefits as the Union. According to Heitz, Lockyear spent most of the interview time telling him joining the Union was not to his advantage.

Heitz did have some difficulty in explaining the percentage of time spent on a discussion of union matters versus the amount of time spent discussing the job he was being hired to perform. He recalls Lockyear gave him a prehire package of employment-related literature. Lockyear testified that the package is always given to new hires and it always contains a standard letter explaining that the decision to join the Union rests with the employee. 3/ Heitz however, testified he had never seen such a letter. He essentially denies Lockyear's version, saying the thrust of the interview was Lockyear's persistent effort to dissuade him from joining the Union.

Lockyear testified he only vaguely recalled interviewing Heitz in June. He explained he has approximately 30 interviews per month and for that reason is unable to be more specific. He could only testify about the routine he normally follows in such circumstances. He said employees who are being interviewed commonly ask why they should join the Union and his standard answer is: "The choice is yours." He also said he doubts saying to Heitz or anyone that the Company's benefits were just as good as the Union's, because such a remark is inconsistent with the

3/ The letter to which Lockyear refers is in evidence as Respondent's Exhibit 1. That particular letter is dated March 29, 1977; Lockyear testified the letter is periodically redated. He said it was redated on March 29 and redistributed to all employees at that time because of the so-called misinformation which the Union was allegedly then giving employees about the need for joining the Union.

facts. He observed that all employees received identical benefits under the union contract whether or not they were union members.

It is true that Heitz was a little vague in certain portions of his testimony; however he was no more vague than Lockyear. As between the two, Heitz specifically recalled the interview and specifically recalled the tenor of the interview was to the effect that he should not join the Union. I note, too, that Heitz' testimony is similar to that of Stephens', noted above. Accordingly, I find Lockyear used Heitz' prehire interview as an opportunity to dissuade Heitz from joining the Union.

3. Darlene Forseth

Darlene Forseth is a vinyl-machine operator and is a member of the in-plant Union committee. That committee serves both as a grievance committee and as an ad hoc negotiating committee.

On July 18 she was called to General Superintendent Hensley's office. When she arrived she found the other members of the committee present as well as three female employees from the vinyl room. These were Mary Ann Tooley, Wrilda Chancellor nee Edwards and Elris Jones.

According to Lockyear, a short time earlier, four female employees from the vinyl department (the three mentioned above plus one Schwand) had come to his office. He said Chancellor was very upset and Tooley was almost in tears. Chancellor did most of the talking and reported "there was an employee in the plant that was harassing them about union activities during working hours" and they wanted it stopped. Moreover, he said, Chancellor claimed the employee was telling them they could be fined for crossing any picket line, their wages could be attached and they could lose their jobs or be forced back into the Union. He recalls Chancellor saying Forseth was the person who was making these remarks. When that discussion ended, Lockyear reported the women's complaint to Hensley and Turner; Turner thereupon directed Lockyear to issue Forseth a reprimand for violating Article XX of the contract which prohibited union activity on the job. 4/ At the time the reprimand was issued, the contract had been opened, and negotiations for a new one were underway. Curiously, as seen infra, Respondent at the bargaining table had earlier taken the position that the contract had expired; a response to a Union contention that the contract may still have been in effect, having been opened only for modification. It is unclear why Turner chose to rely upon a clause in a contract which he believed had expired 6-1/2 weeks earlier.

It is clear that the decision to issue the reprimand was made without investigating Forseth's side of the case. Indeed when she arrived in Hensley's office Lockyear had already prepared the written reprimand. A consolidation of the testimony of all involved shows Lockyear merely said in general terms that Forseth had violated Article XX and was being reprimanded. He never specifically...

4/ Article XX of the contract states in full: "There shall be no union activity during working hours, except as provided in Article XIX -- Grievances."

advised Forseth or the committee what Forseth had actually done. Forseth believed the reprimand referred to an incident in May involving Chancellor while the vinyl department employees were returning to their work stations from a break. She could not understand how she could be in violation of Article XX because that incident had occurred on a break, not during working hours. Therefore, she refused to sign the warning .

In reaching the decision to reprimand Forseth, Lockyear relied principally on Chancellor, not Tooley. During both meetings on July 18, Tooley was so upset she was nearly weeping. Indeed, Tooley was in a similar state during her testimony before me and became virtually incoherent. It was obvious to me, as it must have been obvious to management on July 18, and probably before, that Tooley is highly excitable and has an extremely low emotional threshold.

Tooley testified she believes it was not until the following day, July 19, that she was actually able to articulate her own complaint about Forseth to Lockyear. According to her, the incident occurred on July 18, and although she wished to complain to management about it, was then unable to do so. Chancellor, Jones and Schwand, sympathizing with Tooley's then upset state, accompanied her to Lockyear's office.

However, only Chancellor appears to have articulated any complaint. Chancellor said she told Lockyear that if Forseth would quit running up and down between the machines causing friction and anxiety, it wouldn't be so bad. Chancellor conceded Forseth never said anything directly to her about the Union and all she had heard were rumors. She claimed to have earlier overheard Forseth speak to an employee named Puckett, telling him that if employees attempted to resign from the Union, the Union had hired a lawyer and the employees could be sued. It is not clear if she related that to Lockyear; probably she did not. Chancellor told Lockyear she had heard these rumors from other sources as well.

Chancellor admits all vinyl room employees, not just Forseth, occasionally engaged in union activity on the job. She conceded that union solicitation on the job didn't bother her and she admits to having done it herself. Once during working hours she tried to get a coworker named Ferguson to join the Union. She says Tooley even did the same thing at one time. Moreover, Chancellor readily conceded that the talk about lawsuits was all rumor and Lockyear had told them not to believe everything they heard. Even absent Lockyear's assurance, Chancellor admits she had a pretty good idea the talk of lawsuits was "malarkey."

At one point during the initial July 18 meeting with Lockyear, Chancellor says Tooley was in such a state that she could not speak. At another point she says Tooley told Lockyear that Forseth had told her that if employees crossed the picket line they could be sued.

It should be observed here that Chancellor, on August 16 signed an affidavit in which she omitted the entire July 18 incident(s). Also in that same affidavit she makes the flat statement that although she had heard rumors

in the plant to the effect that employees who tried to withdraw from the Union would be sued, wages cut and insurance taken away, no member of the union negotiating committee (which included Forseth) and no officer of Local 3-200 and no agent of the IWA ever made any such statement to her. She doesn't even mention Forseth's alleged statement to employee Puckett.

In reviewing Lockyear's and Chancellor's testimony, I find it strange that she does not corroborate what he says she told him on July 18. He says she told him Forseth was harassing employees with union activity during working hours, describing certain detriments which would befall them if they resigned from the Union or crossed its picket line. She says she told Lockyear Forseth was causing friction and anxiety running up and down between the machines (presumably talking about the Union in some fashion, but she doesn't specifically say so). Not only did she fail to testify about Forseth's specific activity, she conceded before me that Forseth had not engaged her in such conversations and she had only overheard Forseth make such statements to Puckett, not Tooley. If that is so, how did Lockyear learn of Tooley's complaint? Moreover, why did Chancellor omit all of this from her affidavit and say she had never heard any member of the union committee (necessarily including Forseth) make such remarks? One answer is that Lockyear probably didn't learn of Tooley's complaint from Chancellor, but from Tooley on July 19. Other possible answers are that Chancellor either exaggerated to Lockyear, or Lockyear jumped to conclusions about Forseth. Tooley's testimony makes the first and third answers the most likely, though Chancellor's exaggeration cannot be discounted. Perhaps all three answers are correct to some degree.

Tooley testified that the incident which triggered her tears on July 18 consisted of only a few words uttered by Forseth. According to Tooley, either July 18 or possibly the day before, Forseth had observed that the Union needed only a few more signatures and it would have its quota for a closed shop, and if people joined after the quota was reached, they would have to pay a $40 initiation fee.

Tooley had joined the Union in March but had resigned on approximately July 10 or 11, the week before. She said that on July 18 Forseth told her she couldn't resign and the Company would be sued and employees fined if they crossed the picket line; moreover, if they crossed the picket line, employees would be unable to get their wages.

The foregoing two paragraphs are the consolidation of hesitant, confused testimony given by Tooley on direct. On cross-examination she could only testify about what had occurred in Lockyear's office, not Forseth's statements, and conceded she may not have been able to tell him about Forseth's alleged threats until July 19. With regard to nearly everything else mentioned above, she was virtually incoherent.

Frankly, I find Tooley to be confused and unable accurately to recall what transpired. Indeed, it appears to me that while she may basically be an honest individual, her recollections cannot be relied upon. Indeed, I am certain that even as an employee, not simply as a witness, her observations

and recollections must be weighed in that light. Certainly her performance on July 18 could not have been sufficient evidence to be relied upon by Lockyear and Turner if they were acting reasonably. An employer truly wishing to investigate improper employee conduct would not wholly rely upon the oral statement of a virtually incoherent individual, who was incapable of describing what had happened to her. Even if she managed to say it was Forseth who had upset her, a fair-minded employer would have asked Forseth of her version of what had occurred. Yet, Respondent did not do so; instead, it made up its mind to issue Forseth a warning letter before discussing the matter with Forseth in any way.

Respondent's method of investigating the accusation of Forseth, its jumping to conclusions, and its precipitate issuance of the warning to her raise questions themselves. If it had little or no factual basis for disciplining Forseth, why did it do so, and why did it do so in such a hasty, reckless manner? In view of the fact that Respondent had earlier engaged in unjustified interrogation of Randle and Stephens, and had gone out of its way to dissuade Heitz from joining the Union, it appears to me that Respondent's action can only be explained as a deliberate attempt to disparage the Union by disciplining one of its in-plant committee members.

B. Collective Bargaining

As noted earlier, the Union's letter of March 14 opened the 1975-1977 agreement for negotiation. On that day it submitted certain proposals and on March 31 it submitted some additional proposals. Thereafter, the parties engaged in five negotiation sessions between May 16 and August 1, when the Union struck. The first negotiation meeting occurred on May 16 and was a typical first meeting in that the Union explained its proposals to the Employer. The proposals which were given to Respondent at that time were so-called "local openers," meaning that they were proposals from the Local, rather than from the Local's parent International Union. The union representatives explained that a settlement had just been reached (or was about to be reached) with certain large wood products industry employers located in Washington State, two areas of Oregon and California. This settlement is later referred to by the parties as the "industry settlement."

With regard to so-called cost items, the local openings were not specific on exact amounts. However, the Union did ask for a general wage increase, a cost of living increase, some wage adjustments on certain job classifications, an increase in the Employer's pension contribution with concomitant benefit improvements, and an increase in the Employer's contributions to health and welfare with concomitant improvements of those benefits as well. On union security, the Union asked to change the existing maintenance of membership clause to a standard union shop clause. There were other items as well, but they are not pertinent to this analysis. After the Union presented and explained its demands the meeting was adjourned to give Respondent time to consider them. Neither Douglass nor Miller asked Respondent to specifically reply to the Union's wage demand, probably because it was not yet specific enough.

The next meeting occurred on June 9. As previously noted, Hugh Kidwell appeared in Miller's place on the Union's negotiating team; he became the Union's

principal spokesman. Kidwell presented the "industry settlement" as the Union's proposal in addition to the previously offered local openings. This proposal included a wage increase based upon a three-category formula. 5/ In addition the "industry settlement" called for increased contributions to the health and welfare and pension plans which Respondent had joined much earlier. 6/

The parties discussed those proposals in some depth and during that period, "Dee" Hustead, Respondent's professional negotiator, admits telling Kidwell that Respondent did not wish to set a pattern because it was too early to do so. 7/ He did concede to Kidwell that Respondent expected to grant a reasonable wage increase. Kidwell recalls attorney Newcomb saying that Respondent believed the industry settlement did not fit Respondent's operations as it was not part of the "industry" as that term is generally used. Newcomb argued that Respondent was a moulding operation and not an integrated wood products business and was, therefore, in a separate industry. Both Douglass and Kidwell recall Newcomb saying the Union was not treating Respondent fairly because it was competing with other moulding operations in Northern California which had collective-bargaining agreements which did not expire until August, September or October 1977. They recall Newcomb asking if the Union would wait until the Northern California operations settled new collective-bargaining agreements with their unions. Hustead admits telling the Union that Respondent was not a pattern-setter. He also recalls Kidwell asking Newcomb if Respondent wanted the Union to wait until the competitors had settled with their Unions, and Newcomb replied such an approach was "not unheard of." Also during the meeting Hustead concedes Kidwell asked if he was telling the Union that Respondent was not willing to negotiate until August, and Hustead replied, "Well, we're meeting with you aren't we?" Kidwell then asked, "Well, when are you going to have an offer or counteroffer? We are not going to wait until August." Either Hustead or Newcomb

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5/ The formula divided job classifications into three categories. In the first year the wage increase for each category was to be 70 cents, 80 cents and 90 cents. In the second year it was 60 cents, 70 cents and 80 cents. In the third year it was also to be 60 cents, 70 cents and 80 cents.

6/ On June 8, 1967, Respondent signed a participation agreement in the Timber Operators Council, Inc.-IWA Health and Welfare Plan and on September 22, 1971, Respondent signed a participation agreement in the Timber Operators Council, Inc.-IWA Pension Plan. Each of these plans consists of a trust jointly administered by the Union's parent International Union and Timber Operators Council, Inc., an association representing various employers in the wood products industry.

7/ It appears that Respondent believed that in 1975 it had unwisely signed the collective-bargaining agreement in the belief that other competitors would follow suit. When they did not, and successfully negotiated contracts containing lower cost items, including wages and fringes, Respondent found itself disadvantaged competitively. It did not want that situation to arise again. See Turner's testimony, infra, p. 11.

replied that Respondent had been a leader in the past and did not wish to be a leader again.

Turner testified that at this meeting Respondent "tested the water" to determine what the Union's reaction to an interim contract would be. He said that it was definitely Respondent's preference to wait until settlements were reached by the competitors with their unions; he said Respondent did not want to be in the same position as it had been in 1975 when it had signed first, and union contracts which its competitors had signed later failed to meet the wage and fringe levels to which Respondent had agreed. He recalls Kidwell said he wanted to negotiate a new contract at that moment and Newcomb replied by asking Kidwell to sign up other moulding companies first (an apparent reference to some nonunion competitors in Oregon).

The next meeting occurred on June 24. Kidwell asked for Respondent's proposal on wages but Respondent had none. Newcomb simply said Respondent would not set a pattern. According to Douglass, Newcomb repeated that the Union was placing Respondent in an unfair position with respect to its competitors in Northern California; moreover, Hustead and Newcomb both said Respondent did not wish to pay the higher health and welfare and pension rates. Kidwell asked if Respondent was pleading inability to pay, but Newcomb replied it was not. Newcomb said Respondent was willing to continue fringe benefits at the previous rates, but not at the rates which had been set by the "industry settlement." Newcomb hoped the TOC-IWA health and welfare trust would agree to pay a second level of benefits. At this point there was some discussion of whether or not either the health and welfare or the pension trusts would or could accept contributions at the previous rates. During that discussion the Union continued to insist on the new rates.

With regard to the wage question, Kidwell said he was aware that Respondent was not a large company like Crown Zellerbach, Weyerhaeuser or Georgia-Pacific and the Union didn't intend to "hold tight" to the industry settlement; it was prepared to accept less.

Also at this meeting, according to Hustead and Turner, as well as Douglass' hazy recollection, Kidwell made a short-lived claim that the 1975-1977 contract was opened only for modification and had not yet terminated. Newcomb rejected that view. Hustead recalls Kidwell asked the Company to keep the contract in effect until impasse, but Newcomb rejected Kidwell's contention that the contract may have only been open for modification and was still in effect.

At this point Newcomb said Respondent still had two or three ideas to explore at the next meeting. Douglass recalls Newcomb asking whether or not the Union was interested in the concept of an interim agreement which would expire after the Northern California competitors had settled with their unions -- apparently September. Douglass recalls Kidwell replying that they were there to negotiate now and were not concerned with what was happening elsewhere.

Turner testified Respondent "had detected some concern on the Union's part that the contract had expired and people were resigning. We thought that there might be some advantage to both parties if we proposed an interim agreement."

He says he suggested that to Kidwell who answered that the Union would listen to anything. Turner also remembers that after a discussion of the nonunion and Northern California competitors, Kidwell said, "If you have all of this information, why aren't you ready to make an offer?" Turner also remembers a discussion about "setting a pattern" but does not recall what it was.

In addition, Turner remembers Hustead saying Newcomb had given the Union an alternative if it was interested -- a clear reference to the concept of an interim agreement. A caucus was called at that point according to Turner and, after it was over someone, either Hustead, Newcomb or Turner said the time was not right to explore a proposal to the Union and one of them said that around the first of the next week someone would be in contact with the Union on the subjects which had been discussed that day. The meeting then ended.

The next meeting was held on July 8. The meeting opened with Kidwell asking for Respondent's counterproposal; Respondent's representatives did not directly respond but began discussing the problems they had discovered with regard to a second level of benefits under the TOC-IWA health and welfare trust. Turner reported that the Company had looked into it and all agreed that the trusts would not accept a lesser contribution than that set by the newly signed industry settlement; moreover, a second level of health benefits could not be obtained. Newcomb told the Union that Respondent would continue to pay the fringe benefits at the old rate as long as the trusts would accept them.

Kidwell said he wanted "any offer" from the Company and the Union would look at anything. Hustead told him Respondent was not interested in a long-term situation and asked if Kidwell would consider an interim contract. According to Hustead there was some discussion about the nonunion competitors. He said no Company representative suggested a means by which Respondent could become competitive with those firms. He says Kidwell asked if Respondent was pleading inability to pay and Newcomb replied it was not. Hustead says he told the Union that the Company wanted to be on equal footing with its competitors and either he or Newcomb agreed, saying the Company would be fools to make an offer without knowing what the other companies were doing. 8/

At that point, knowing Kidwell wanted any offer, Hustead asked if the Union would be interested in an interim agreement. Kidwell again replied that the Union would look at anything. Respondent asked for a caucus and retired for an hour or so while it prepared a written proposed interim agreement. That proposal has been received in evidence as an attachment to General Counsel's Exhibit No. 7, a cover letter. After Respondent had the proposal and the cover letter typed, the parties resumed their discussion and Respondent's interim contract proposal was submitted to the Union. It contained four provisions, the first of which was: "The prior agreement will be renewed on an interim basis for a period of 60 days and thereafter until either party gives 10 days written notice of termination." Item 3 provided that all general wage increases negotiated would be retroactive to June 1.

8/ Hustead's testimony. (Tr. 499).

Kidwell caucused his negotiating committee and they decided to reject it. He says upon their return he reported that the very concept of an interim agreement was not acceptable and even if it were, this particular proposal would not be accepted because of item 1, the 10-day notice provision. Another reason given by Kidwell for rejecting the interim agreement was the fact that it did not specifically deal with the health and welfare and pension contribution problems (it appeared that the trusts would refuse to accept contributions at the old rate) and because there was no guarantee that a union shop clause would appear in the next agreement.

After the Union rejected the proposed interim contract, both Douglass and Kidwell say Kidwell demanded a wage proposal. Douglass recalls Newcomb saying that he was disappointed in the Union's rejection of the interim contract and Kidwell replied there was nothing in it for the Union. Turner said the Union rejected the interim proposal unless Respondent would agree to a union shop clause in the next contract, but he rejected that out of hand. 9/ Turner admitted he knew all along that the 10-day notice provision would never be accepted by the Union.

Kidwell, frustrated by the progress of bargaining, told Respondent that their next meeting would be under the auspices of the Federal Mediation and Conciliation Service and that a mediator would arrange the next meeting.

On July 10 or 11, the Union held a meeting of its membership and informed the membership that Respondent had made no economic offer in response to the Union's "industry settlement" demand, Douglass sought strike authorization and the membership voted to give the bargaining committee the right to strike at its discretion. In addition, Douglass showed the membership Respondent's proposed interim agreement; they rejected it.

When the next negotiation meeting opened on July 26 there was an initial discussion between Newcomb and Kidwell about the health and welfare problem. Newcomb repeated that Respondent still wished to obtain a second level of benefits (thereby maintaining the old contribution rate) but that the trust would not accept a contribution less than the rate set by the industry settlement. He went on to say that Lockyear had been in the process of investigating other plans and had found one which was equal to the TOC-IWA plan. According to Douglass, Newcomb was no more specific than that. Douglass says Newcomb never told the Union it intended to stop the contributions. Hustead remembers the Union remained firm on its position that Respondent should pay the higher rates on health and welfare and pension as reached by the industry settlement.

9/ At the hearing (Tr. 72-73; 152) Respondent sought to prove and now argues (Resp. Brief p.10) that the Union was seeking a union shop clause in the interim agreement. This is inconsistent with even Turner's version and it is extremely unlikely that the Union would have made such a demand. It is clear to me that at all times until July 26 the Union sought a union shop clause in the successor long-term agreement.

The parties then engaged in a discussion of the interim contract proposal. Initially Respondent's proposal was the same as that set forth in General Counsel's Exhibit No. 7. However, it quickly dropped the 10-day notice provision, and substituted October 1 as a fixed expiration date. It also offered to continue the TOC-IWA health and welfare trust so long as it would accept the lower contribution rate. If it would not accept the old rate, Respondent offered to hire another carrier to supply the same benefits. Newcomb also said that since the TOC-IWA pension trust also would not accept the old rate, Respondent would set that money aside in a special bank account to be disposed of later by negotiations. The Union then caucused.

Upon its return from the caucus, Kidwell gave the mediator a 7-point counteroffer. The Union accepted October 1 as the expiration date for an interim agreement, as well as the Company's proposals regarding vacation options, changed job classifications and wages retroactive to June 1. But it rejected Respondent's proposals on health and welfare and pension and insisted that the contributions to those trusts be on the basis of the industry settlement. It also said that the long-term agreement negotiations would have to begin after Labor Day. Finally, the Union asked that Respondent not recognize, for union security purposes, the union membership resignations which had occurred since June 1.

Respondent, according to Turner, rejected the first as too expensive and the second as illegal. Shortly thereafter the meeting ended. However, before the end, Kidwell advised the mediator, acknowledged by Hustead, that the Union was withdrawing its demand for a union shop. Kidwell says he withdrew it because he knew Respondent would never agree but hoped such a concession on the part of the Union would "get the ball rolling." Kidwell again asked for an economic offer, but there was no reply. The meeting ended subject to call by the FMCS.

Thereafter, according to Douglass, the union negotiating committee decided to call a strike under its previously-granted authorization. From the Union's vantage point Respondent had not yet made a proposal on wages and nothing had changed in that regard since the strike authorization. Accordingly, it called a strike for August 1.

On that day, according to a stipulation of the parties, 240 employees appeared for work while 88 did not. Testimony shows that by August 15, those strikers who had not returned to work were replaced. 10/

Additional negotiation meetings occurred on August 2, September 2, October 14 and December 5 and 6. It was not until the October 14 meeting that Respondent ever made an economic wage offer. At that time it offered an across-

10/ On September 10, a decertification petition was filed, Case No. 36-RD-586. It was dismissed on October 3 because of the pendency of the instant charge. On October 6, a union security deauthorization petition was filed, Case No. 36-UD-158. It was later dismissed because no collective-bargaining agreement containing a union security clause was then in effect.

the-board 8 percent wage increase. Although the record may not clearly show it, approximately 2 weeks before the hearing convened in this matter, the Union on behalf of the remaining strikers offered their return to work.

C. The Unilateral Change Question

Many of the facts relating to Respondent's unilateral change with regard to the health insurance and the pension plans are set forth in the preceding subsection. It is unnecessary to detail the exact dates, but it appears that the TOC-IWA health and welfare trust granted Respondent a 1-month extension, which was paid. Thereafter, Respondent purchased substitute coverage from Aetna, a private insurance carrier. No such extension was granted with regard to the pension contributions and Respondent began depositing those monies in a separate bank account.

With regard to the substitution of health plans, it is clear that no representative of Respondent ever advised the Union it had selected a particular insurance plan. The substitute plan was simply placed into effect immediately upon the date the TOC-IWA plan, as extended, expired. Despite Turner's belief that coverage offered by the private carrier is identical to that previously offered by TOC-IWA, he conceded he did not know whether that was exactly true.

IV. Analysis and Conclusions

A. Interference, Restraint and Coercion

I have earlier found that Respondent had no legitimate business need to interrogate employees Randle and Stephens regarding why they had joined the Union. That being the case, what did Respondent hope to achieve? Certainly these were not idle questions, for Lockyear specially called those two to his office for private interviews and even sought such an interview with Stephens' husband. The only reasonable explanation is that Respondent believed it could either weaken the Union or keep it weak if it could undo the Union's membership drive to some extent. That further incidents do not appear to have occurred does not change this analysis, because about that time Hustead warned Lockyear to avoid further interrogation.

A similar observation may be made about the Heitz interview when Lockyear told him to avoid joining the Union. It is clear to me that even though the comment may not have been directly connected to a threat, Lockyear's message was clear: Heitz should avoid joining the Union if he wished to remain on good terms with management.

Again, even if a threat cannot be inferred, such a message to a new hire might well, if successful, prevent the Union from obtaining a new member (particularly since the contract had expired and a strike could be foreseen) and would tend to have made negotiations more difficult for the Union. Accordingly, I conclude that the interrogations of Randle and Stephens tended to interfere with, restrain and coerce them in the exercise of their Section 7 rights. The threat implied in Lockyear's importuning Heitz to refrain from joining the Union did the same. I

find, therefore, that such activity violated Section 8(a)(1) of the Act.

Insofar as Forseth is concerned, aside from questions of credibility and/or motive, it is clear that the contract on which Respondent relied to justify the warning had expired and Article XX had no life. Thus Respondent in issuing the warning was in effect imposing its own rule of conduct upon Forseth. Assuming that a union may waive employees' rights to engage in Section 7 activity (an assumption which probably cannot be made: see N.L.R.B. v. Magnavox Company of Tennessee, 415 U.S. 322 and Gale Products, Div. of Outboard Marine Corp., 142 NLRB 1246), because of the contract's expiration no waiver can be presumed here. Thus, I shall simply find the Article XX language to be a company rule. As such, it is unlawful on its face. It is unlawful for it is so broad as to prohibit union activity during nonwork time. Such a rule unduly restricts employees from engaging in protected activity at times when they may be in the plant, but when they are not actually being required to perform work. See Essex International, Inc., 211 NLRB 749.

Aside from that analysis, however, it appears that Respondent's warning to Forseth was actually motivated by antiunion considerations and it is unnecessary to determine whether she had even engaged in the activity Tooley apparently accused her of. 11/ Two weeks earlier employee Kelhoyama had solicited union membership on the job during working hours. He was not a member of the union committee. Respondent was aware of his conduct, but did not discipline him; it only asked the union committee to see that such activity ceased. The only difference between Kelhoyama's situation and Forseth's is that Forseth was a committee member. That being so, it is clear that Respondent disciplined her for her committee-member status, not her conduct. That is particularly clear when the shallow nature of the evidence against her is scrutinized. 12/ Accordingly I find that Respondent violated Section 8(a)(3) and (1) when it issued the July 18 warning to Forseth.

B. Majority Status and Alleged Union Misconduct

Respondent has raised two matters in its defense which may be dealt with summarily. It claims the Union no longer represents a majority of the unit employees. If it truly believed that, it should have raised the issue either prior to or during negotiations. It did not do so until it answered the complaint herein. In any event, Section IV. A. of this decision demonstrates clearly that Respondent was, during bargaining, engaging in unlawful conduct which probably had some negative impact on the size of the Union's membership. Whether that conduct was intended to eliminate the Union's majority status or was simply to give Respondent a bargaining advantage is not important. What matters is that Respondent was unlawfully tinkering with the Union's representative status and may not rely on its own misconduct to now claim the Union lacks a

11/ Forseth credibly denied Tooley's accusations.

12/ The effect such a warning may have had on the union membership or union activity of others cannot be overlooked here, either, particularly since Forseth was attending bargaining meetings.

majority. C & C Plywood Corp. and Veneers, 163 NLRB 1022; Miami Coca-Cola Bottling Co., d/b/a Key West Coca-Cola Bottling Co., 150 NLRB 892. Moreover, the Union here was certified by the Board in 1965 and enjoys a presumption of continued majority despite unit expansion, turnover, or the failure of many employees to join the strike (which, as will be seen was caused by Respondent's bargaining tactics). King Radio Corp., 208 NLRB 578.

Respondent also contends it may refuse to bargain with the Union because of alleged Union misconduct upon the beginning of the August 1 strike. It contends the Union did not properly control the strike and permitted mass picketing, tack strewing and hitting autos with picket signs. Assuming all these things happened (which is not really supported in the record), they stopped almost immediately and there is no evidence that union officials participated in or encouraged such conduct. In sum the evidence is too thin to base an improper conduct finding upon. Respondent's principal evidentiary proffer is a state court injunction dated September 7.

C. Respondent Engaged in Dilatory Bargaining

A careful review of the record leads me to conclude that Respondent entered into collective-bargaining negotiations with the Union with the purpose of delaying an agreement until it could get a reading on the wage settlements which were expected to be reached by its Northern California competitors during the late summer and fall of 1977. In order to obtain that perspective, Respondent engaged in dilatory, surface bargaining with the Union. Such conduct clearly violates Section 8(a)(5) of the Act. Moreover, it appears to me that such conduct was the principal cause of the strike which began on August 1 and that the strikers were unfair labor practice strikers and are entitled to be treated as such upon their abandonment of the strike and their unconditional offer to return to work.

I reach these conclusions principally because it is clear that Respondent never made a wage offer until October 14 despite the fact that it was well aware of the economic costs being borne by both its nonunion competitors in Oregon and by its union competitors in Northern California. When it discovered the Union wished to press for an immediate long-term contract, Respondent kept silent and refused to engage in serious discussion about the Union's offer. Instead, it left the Union hanging, awaiting an offer. Then, when the Union had become sufficiently impatient, it made not an economic offer, 13/ but an interim proposal which Turner knew would be rejected.

In a very real sense Respondent baited a trap for the Union which was simply designed to permit time to pass. The trap consisted of Respondent's attempt in the early stages of negotiation to persuade the Union that it would be fair to await the outcome of the Northern California negotiations. Respondent knew that if the Union rejected that approach, it could still attain that objective by making

13/ That the offer included retroactivity does not detract from the fact that Respondent refused to discuss wage rates.

a proposal which would surely be rejected. Turner's admission that he knew the Union would reject an interim contract calling for a 10-day notice of cancellation is clear evidence of that purpose. When in fact it was rejected on July 8, Kidwell asked Respondent for an economic proposal on a long-term contract. However, Hustead, earlier in the meeting had already said Respondent was not interested in a long-term situation (prior to submitting the interim contract proposal), thereby admitting that Respondent intended to wait for a perspective on what was occurring in Northern California. Moreover, in an exchange prior to the submission of the interim proposal, and in response to Kidwell's request for an economic offer, Hustead and Newcomb failed to definitively answer Kidwell's request. Kidwell asked if they were pleading inability to pay. Newcomb replied they were not and Hustead said Respondent merely wanted to be on an equal footing with its competition. Hustead admits either he or Newcomb then remarked that the Respondent would be "fools" to make an offer without knowing what its competitors were going to do.

After the Union had rejected the interim contract proposal and Kidwell had asked for an economic offer on a long-term agreement, instead of replying directly, Newcomb said Respondent was "disappointed in the Union's attitude," but declined to go beyond the interim proposal. Kidwell told Newcomb the interim proposal had nothing in it for the Union, clearly implying that the Union was rejecting the concept.

On July 26, Respondent repeated its proposal for an interim agreement. This time, however, when it was rejected out of hand, Respondent made two specific modifications, dropping the 10-day notice requirement and proposing to resolve the health and welfare and pension problems by saying it would continue to make contributions at the old rate as long as the trusts would accept them; if the trusts would not, it would substitute a health plan containing equal benefits and would place the pension contributions in a bank account. The latter proposals, while facially appearing to be reasonable, are in reality nothing more than an offer to maintain an existing situation. In normal circumstances proposing the status quo would not necessarily be evidence of surface bargaining, but here I believe it is, because Respondent knew, as before, that the Union would reject it. Again, it was an attempt to let time pass and was simply a red-herring.

At this point, however, the Union followed the false lead and made a 7-point counterproposal on an interim agreement. It may well have been that the Union's counterproposal contained an improper clause (the proposal that Respondent dishonor resignations from the Union for union security purposes) but it did imply that an interim agreement might be acceptable if Respondent would consider a union shop clause in the new long-term agreement. As a union shop clause was entirely unacceptable to Respondent, the Union's overture here was immediately rejected.

It will be recalled that during the hearing Respondent sought to prove, and now argues, that the Union wanted to insert a union shop clause in the short term, interim agreement. This is a mischaracterization of the facts for there is no credible evidence that the Union ever suggested that the interim agreement contain a union shop clause. In fact, Turner in referring to the July 8 discussion,

admits as much when he says the Union rejected the interim contract concept unless there was a union shop clause in the next agreement.

This is not the only mischaracterization of the facts which concerns me. Respondent also argues that the concept of the interim agreement came from the Union. That is not correct for the suggestion was Newcomb's; on June 24 he asked if the Union was interested in the concept of an interim agreement. 14/ Later, on July 8, Hustead asked Kidwell if the Union was interested in a short-term or interim agreement. Quoting from Douglass' testimony, Kidwell's reply was "Maybe -- possibly a year or less; I don't know, I can't answer that; we will look at anything." That response can hardly be characterized as anything but an equivocal answer. At that point Respondent had made no counteroffer whatsoever and Kidwell's statement is simply evidence that the Union wanted to start some place. It cannot be translated to a claim that the Union wanted an interim agreement, or that an interim agreement was the Union's idea.

Both these mischaracterizations appear to me to be simply attempts at obfuscation and, as such, are in themselves evidence that Respondent did not enter into negotiations in good faith. I regard Respondent's distorting the Union's demand for a union shop to a demand to insert a union shop clause into the interim agreement, an extremely unlikely possibility, as evidence that Respondent saw the issue as an opportunity to confuse bargaining, and thereby could gain even more time. 15/

Finally, there is the salient fact that Respondent never made an economic offer until October 14. At that point a sufficient amount of time had passed so Respondent could see what had occurred in Northern California. It had accomplished its purpose of reaching that date and could now make, from its point of view, an intelligent decision with regard to wages and other cost items.

All of this results in no other conclusion than that Respondent was engaging in dilatory, surface bargaining from the outset. 16/ Such conduct was a direct cause of the August 1 strike and I therefore find these strikers to be unfair labor practice strikers.

14/ As early as June 9, according to Turner, Respondent was "testing the water" for the Union's reaction to an interim contract proposal.

15/ As noted supra, Respondent's Section 8(a)(1) activity appears, at least in part, to have been aimed at the Union's solidarity and to either create and/or take advantage of the resulting loss of strength at the bargaining table.

16/ As the Court of Appeals for the 5th Circuit said in N.L.R.B. v. Herman Sausage Co., 275 F.2d 229 at 231-232 (1960):

> The obligation of the employer to bargain in good faith does not require the yielding of positions fairly maintained. It does not permit the Board, under the guise of finding of bad faith, to require the employer to contract in a way the Board might deem proper. Nor may the Board "* * * directly or indirectly, compel concessions or otherwise sit in judgment upon substantive terms of collective bargaining contracts, * * *" for the Act does not

(Continued)

D. Unilateral Changes

It is clear that Section 8(d) of the Act obligates an employer, upon the expiration of a collective-bargaining contract, to maintain existing wages, hours and terms and conditions of employment, and unilateral changes in those matters constitutes a violation of Section 8(a)(5). N.L.R.B. v. Katz, 369 U.S. 736 at 747 (1962); Master Slack and/or Master Trousers Corp., et al., 230 NLRB No. 138. Health insurance and pension plans are included in the definition of employment conditions. Hinson d/b/a Hen House Market No. 3, 428 F.2d 133 (C.A. 8, 1970); and Sir James, Inc., 183 NLRB 256.

It is undisputed that Respondent ceased making payments to both the health/welfare and pension trusts at some point following the July 26 meeting. By that meeting both parties knew that neither trust would accept contributions at the previous rates. In that circumstance, do the above principles of law still apply or was Respondent privileged to cease making the payments?

In addition to ceasing to make the payments to the trusts, Respondent, without consulting the Union, simultaneously purchased health insurance from Aetna and began depositing the money otherwise destined for the pension trust into a separate bank account. In view of the trusts' refusal to accept premiums at the old rate, were Respondent's actions therefore privileged?

Respondent argues that an impasse had arisen on these matters and it was privileged to implement these changes because they were consistent with its last offer to the Union on July 26. Aside from whether the conduct was consistent with the offer, I doubt that there was a true impasse. First, Respondent, as I have found, was engaging in unlawful dilatory bargaining, and no legitimate impasse can occur in that circumstance. Cf. Wayne's Olive Knoll Farms d/b/a Wayne's Dairy, 223 NLRB 260; and Herman Sausage Co., 122 NLRB 168, enfd. 275 F.2d 229 (C.A. 5, 1960). Second, although Respondent did on July 26 propose taking

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16/ "regulate the substantive terms governing wages, hours and working conditions which are incorporated in an agreement." NLRB v. American National Ins. Co., 1952, 343 U.S. 395, 402, 404, 72 S.Ct. 824, 96 L.Ed. 1027, 1036, 1037, affirming American National Ins. Co. v. NLRB, 5 Cir., 1951, 187 F.2d 307.

On the other hand while the employer is assured these valuable rights, he may not use them as a cloak. In approaching it from this vantage, one must recognize as well that bad faith is prohibited though done with sophistication and finesse. Consequently, to sit at a bargaining table, or to sit almost forever, or to make concessions here and there, could be the very means by which to conceal a purposeful strategy to make bargaining futile or fail. Hence, we have said in more colorful language it takes more than mere "surface bargaining," or "shadow boxing to a draw," or "giving the Union a runaround while purporting to be meeting with the Union for purpose of collective bargaining." [Emphasis supplied; footnotes omitted.]

the action it eventually took, it was in the context of a proffered interim contract. No real bargaining on a successor contract had begun and thus there were many issues which had not even been discussed, much less resolved. Moreover, the Union on July 26 had just made a concession on its demand for a union shop. Thus, negotiations had not reached a stage where an impasse could have occurred. Compare Crest Beverage Co., 231 NLRB No. 25, and the impasse criteria of Taft Broadcasting Co., 163 NLRB 475.

Leaving the question of impasse and returning to the trusts' conduct, there appears to be a legitimate question of whether or not a trust in these circumstances can properly refuse to accept status quo contributions during the pendency of bargaining. It seems to me that such a refusal is contrary to the policies of Section 8(d) as discussed in Katz and Hinson requiring the parties to maintain conditions during that time. 17/ The General Counsel does not make such an argument and I therefore will not address myself to it.

The General Counsel does, however, contend that the 1967 and 1971 participation agreements bind Respondent to pay the higher premium rates as now called for by the trusts. I cannot concur. The participation agreements call for no specific amounts of contribution. Those amounts are found in the collective-bargaining contracts and have changed over the years. Nothing in the participation agreements contemplates binding Respondent to anything except what is achieved at collective bargaining. To hold that Respondent is bound by the participation agreements to the higher "industry settlement" rate would in effect permit a third party to dictate terms to Respondent. If that had been contemplated in the participation agreements, I might concur with the General Counsel. However, the fact that specific rates appear in the collective-bargaining contract militates against that conclusion and favor the conclusion that the amounts are to be set by collective bargaining between Respondent and the Union; not dictated by the trusts. Accordingly, I reject the General Counsel's argument that Respondent is bound to pay the new rates by virtue of the participation agreements.

In view of the fact that the trusts would not accept contributions at the old rate, I find Respondent's cessation of payments to those trusts not to be a violation of Section 8(a)(5). However, I do find that Respondent's purchase of the Aetna plan without first consulting with the Union does breach the Katz principle and constitutes a violation of Section 8(a)(5). It does not matter that the benefits under that plan may be identical to the TOC-TWA plan. As the Court said: 18/

17/ The Board has forced similar trusts to accept contributions contrary to their rules. To my knowledge, however, these orders have always been in a remedial context. Carpenters Local #1913 (Fixtures Unlimited), 213 NLRB 363, theory of remedy modified sub nom. N.L.R.B. v. Carpenters 1913 and Carpenters Pension Trust for Southern California, 531 F.2d 424 (C.A. 9, 1976); and Jacobs Transfer, Inc., 227 NLRB 1231.

18/ 369 U.S. 736 at 742-3. See similar language at 747.

> The duty "to bargain collectively" enjoined by §8(a)(5) is defined by §8(d) as the duty to "meet * * * and confer in good faith with respect to wages, hours, and other terms and conditions of employment." Clearly, the duty thus defined may be violated without a general failure of subjective good faith; for there is no occasion to consider the issue of good faith if a party has refused even to negotiate *in fact* -- "to meet * * * and confer" -- about any of the mandatory subjects. A refusal to negotiate *in fact* as to any subject which is within §8(d), and about which the union seeks to negotiate, violates §8(a)(5) though the employer has every desire to reach agreement with the union upon an over-all collective agreement and earnestly and in all good faith bargains to that end. We hold that an employer's unilateral change in conditions of employment under negotiation is similarly a violation of §8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of §8(a)(5) much as does a flat refusal. [Footnotes omitted.]

The same, however, cannot be said for the pension monies. Respondent, up to the time of the hearing, had not substituted pension plans. It had only deposited the money in a bank account for disposition upon bargaining. It could do little else for the trust would not take it. Accordingly, I find no violation of Section 8(a)(5) in Respondent's action here. This may seem inconsistent with Crest Beverage Co., supra, but in that case there was no convincing evidence that the trust would refuse to accept the old rate. Here, such evidence is present.

V. The Remedy

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5), (3) and (1) of the Act, I shall recommend that it be required to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act, including reinstating with backpay the unfair labor practice strikers upon their unconditional offer to return to work 19/ and the dismissal of subsequently hired employees if that becomes necessary. Backpay and interest thereon shall be computed in accordance with the formula prescribed by the Board in F. W. Woolworth Company, 90 NLRB 289 and Florida Steel Corporation, 231 NLRB No. 117. 20/

Having found that Respondent has refused in good faith to bargain collectively with the Union as the exclusive representative of the employees in an appropriate unit, I shall recommend that Respondent be ordered to bargain collectively in good faith with the Union in that unit, and if an understanding is reached, embody such understanding in a written, signed agreement.

19/ It appears that the Union may have made such an offer on behalf of the strikers in November 1977. However, the record before me is unclear with regard to that matter and I shall leave it for the compliance stage to determine whether the offer was legally sufficient.

20/ See generally, Isis Plumbing & Heating Co., 138 NLRB 716.

With regard to the substitution of health plans, I shall direct Respondent to make whole any employee who suffered any monetary losses by reason of the fact that the substituted health plan may have in some manner provided for lesser benefits than the 1975-1977 TOC-IWA health and welfare trust would have paid, together with interest to be calculated as above. I shall also direct Respondent to cease and desist from such activity and to consult with the Union before making such changes in the future.

Further, with regard to Forseth, I shall recommend that Respondent be required to expunge the July 18, 1977 warning from her records and to treat her as if it had never been issued.

Upon the foregoing findings of fact and upon the entire record in this case, I make the following:

Conclusions of Law

1. Respondent, Clear Pine Mouldings, Inc., is an employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Woodworkers of America, Local No. 3-200, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The following unit is now, and has been at all times material, an appropriate unit for the purpose of collective bargaining within the meaning of Section (9)(b) of the Act:

> All employees of Respondent at its operations near Prineville, Oregon, excluding office and clerical employees, guards, professional and supervisory employees as defined in the Act, as amended, and independent contractors and employees thereof.

4. The Union has been the exclusive collective-bargaining representative of Respondent's employees in the above-described bargaining unit since August 4, 1965, when it was certified as such in Case No. 36-RC-2057, and continues to remain such representative for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment and other terms and conditions of employment of those employees.

5. By interrogating employees in March 1977 regarding the reasons they decided to join the Union and by impliedly threatening newly-hired employees in July 1977 with adverse treatment should they choose to join the Union, Respondent violated Section 8(a)(1) of the Act.

6. On July 18, 1977 Respondent, by reprimanding Forseth because she was a member of the Union's committee and in reliance on an illegal plant rule, violated Section 8(a)(1) of the Act.

7. By engaging in dilatory bargaining tactics beginning on June 9, 1977, Respondent failed to meet its obligation to bargain with the Union in good faith

with respect to wages, hours and other terms and conditions of employment and thereby violated Section 8(a)(5) and (1) of the Act.

8. Respondent's dilatory bargaining tactics as described in the preceding paragraph was the direct cause of the strike which began on August 1, 1977, and the employees who engaged in such strike are unfair labor practice strikers.

9. By failing to notify and consult with the Union before unilaterally changing its health and welfare insurance, Respondent violated Section 8(a)(5) and (1) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended: 21/

ORDER

Respondent, Clear Pine Mouldings, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Interrogating employees regarding their reasons for joining the Union; impliedly threatening employees with adverse employment treatment should they choose to join the Union; disciplining employees because they are members of the union committee; and giving effect to any rule which restricts employees from engaging in rights guaranteed them by Section 7 of the Act during nonwork time.

(b) Issuing employees warning slips which have the effect of weakening their employment tenure because they are members of a union committee.

(c) Refusing to bargain collectively in good faith with International Woodworkers of America, Local No. 3-200, AFL-CIO, in the following appropriate bargaining unit:

> All employees of Respondent at its operations near Prineville, Oregon, excluding office and clerical employees, guards, professional and supervisory employees as defined in the Act, as amended, and independent contractors and employees thereof.

(d) Unilaterally changing the health insurance plan without first consulting with and bargaining with the Union over such a change.

21/ In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(e) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Immediately bargain collectively in good faith with International Woodworkers of America, Local No. 3-200, AFL-CIO as the exclusive representative of its employees in the appropriate bargaining unit, and, if an understanding is reached, embody such agreement in a written, signed contract.

(b) Make whole, with interest, any employee who lost money as a result of Respondent's unilateral institution of a substitute health insurance coverage.

(c) Expunge from the personnel records of Darlene Forseth any and all references to the reprimand given her on July 18, 1977, and in the future treat her as if the reprimand had never been given.

(d) Upon application, offer immediate and full reinstatement to their former jobs, or if said jobs no longer exist, to substantially equivalent employment, if jobs are available, without prejudice to their seniority or other rights and privileges, to all those employees of Respondent in the unit who were on strike on or after August 1, 1977, and who have not already been reinstated, dismissing if necessary any persons hired as replacements by Respondent on or after August 1, 1977. If sufficient jobs are not available for these employees, they shall be placed on a preferential hiring list in accordance with their seniority or other nondiscriminatory practice theretofore used by the Company and they shall be offered employment before any other persons are hired. Such employees shall be made whole for any loss of earnings they may have suffered, or may suffer by reason of Respondent's refusal, if any, to reinstate them by payment to each a sum of money equal to that which he or she normally would have earned during the period from 5 days after the date on which he applied, or shall apply, for reinstatement to the date of Respondent's offer of reinstatement to him, absent a lawful justification for Respondent's failure to make such an offer. Backpay and interest thereon shall be computed in the manner set forth in that portion of this decision entitled "The Remedy."

(e) Preserve and, upon request, make available to the Board or its agents, for examination and copying all payroll records, social security records, timecards, personnel records and reports and all other records necessary to analyze the amount of backpay or health benefits due under the terms of this order.

(f) Post at its place of business in Prineville, Oregon, copies of the attached notice marked "Appendix." 22/ Copies of the notice, on forms

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22/ In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

provided by the Regional Director for Region 19, after being duly signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt thereof and be maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that the notices are not altered, defaced or covered by any other material.

(g) Notify the Regional Director for Region 19, in writing, within 20 days of the date of this Order, what steps Respondent has taken to comply herewith.

Dated: JUN 14 1978

James M. Kennedy
Administrative Law Judge

APPENDIX B.

OPINION OF THE COURT OF APPEALS

Before: Kennedy and Pregerson, Circuit Judges, and Bonsal*, District Judge.

PREGERSON, J:

Clear Pine Mouldings, Inc. ("Clear Pine" or "the company") petitions for review of a decision by the National Labor Relations Board ("the Board") that Clear Pine violated §§ 8(a)(1), (3), and (5) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1), (3), and (5), by improperly interrogating and reprimanding employees, by unilaterally altering the terms of employment, and by refusing to bargain in good faith with the International Woodworkers Ass'n (the union). Clear Pine also petitions for review of the Board's bargaining order. The Board cross-petitions pursuant to 29 U.S.C. § 160(e) for enforcement of its order.

This court will enforce the Board's decision and order if the Board correctly applied the law and if its findings of fact are supported by substantial evidence on the record

*The Honorable Dudley Bonsal, Senior United States District Judge for the Southern District of New York, sitting by designation.

as a whole. Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951); Los Angeles Marine Hardware Co. v. NLRB, 602 F.2d 1302, 1305 (9th Cir. 1979). When conflicting testimony is presented at a hearing, the administrative law judge, having observed the witnesses and heard the testimony, is required to determine the credibility of witnesses. Great Chinese American Sewing Co. v. NLRB, 578 F.2d 251, 254 (9th Cir. 1978); Penasquitos Village, Inc. v. NLRB, 565 F.2d 1074, 1078-79 (9th Cir. 1977). Accordingly, in reviewing the record, we give special weight to the administrative law judge's determinations concerning the credibility of witnesses. Id. at 1079.

8(a)(1), 8(a)(3) VIOLATIONS

The union was first certified as the collective bargaining representative of the company's production and maintenance employees on August 4, 1965. During the ensuing years, the union and the company entered into a series of collective bargaining agreements, the last of which expired on June 1, 1977.

In March 1977, in anticipation of forthcoming contract negotiations, the union began a membership drive among employees who had not yet joined. At an organizational meeting on March 25, the union urged employees to join the union to ensure its strength during negotiations. Some employees who attempted to speak on behalf of the company were shouted down. At this meeting approximately 40 employees joined the union and signed dues check-off authorization forms. All forms were then delivered to the

company.

Immediately after the company received the check-off authorizations, employees Andrew Randle and Laura Stephens were called into the office of Personnel Manager Lockyear who asked them why they had joined the union. He also asked Stephens the name of the person who had solicited her union membership and whether the solicitation had occurred on the job.

On June 7, a week after the expiration of the contract, Lockyear interviewed and hired job applicant Kenneth Hertz. During the interview, Lockyear raised the subject of the union, told Hertz he could choose whether or not to join, and then attempted to persuade Hertz not to join.

Later that summer on July 13, Plant Superintendant Hensley summoned employee Darlene Forseth to his office. Forseth, a leading union adherent and a member of the in-plant negotiating and grievance committee, had worked for the company for four years as a vinyl machine operator. She had a good work record and had never suffered a reprimand. When Forseth arrived at Hensley's office, she found other members of the union grievance committee present, as well as Hensley, Lockyear, and three plant employees, Mary Ann Tooley, Wrilda Chancellor, and Elvis Jones, who had apparently lodged complaints against Forseth. Lockyear handed Forseth a written reprimand alleging that she had engaged in union activity during working hours in violation of Article XX of the Collective Bargaining Agreement. He informed Forseth, in non-specific

terms, that her harassment of and threats against other employees prompted his reprimand.

The administrative law judge found, and the Board agreed, that the company's treatment of Randle and Stephens violated § 8(a)(1) and its treatment of Forseth violated §§ 8(a)(1) and (3). The administrative law judge found that Lockyear questioned Randle and Stephens to investigate rumors, circulating among employees, concerning the employer's future course of conduct if the union were defeated. The administrative law judge found, however, that since the rumors were couched in terms of possibilities rather than in certainties, the company had no legitimate reason to interrogate the employees. The company now contends that its interrogation of Randle and Stephens was justified since it felt compelled to investigate what it regarded as unfavorable and untrue rumors about the company.

Section 7 of the Act grants employees "the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining . . . ." 29 U.S.C. § 157. Section 8(a)(1) of the Act implements this guarantee by making it an unfair labor practice to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [§ 7]." 29 U.S.C. § 158(a)(1).

Interrogation of employees concerning union activities

is not a per se violation of § 8(a)(1). NLRB v. Super Toys, Inc., 458 F.2d 180, 182 (9th Cir. 1972). The test to determine if a § 8(a)(1) violation has occurred is whether, under all the circumstances, the interrogation reasonably tends to restrain or interfere with the employees in the exercise of their protected § 7 rights. Penasquitos Village, Inc. v. NLRB, 565 F.2d 1074, 1080 (9th Cir. 977).

There is no evidence in the record that the company assured Randle and Stephens against reprisal or that Lockyear told them why they were being questioned. See NLRB v. Varo, 425 F.2d 293, 298 (5th Cir. 1970). Moreover, the record supports the finding that the rumors were too speculative to be taken seriously. Ron Boothe, the employee who reported the rumors to Lockyear, tesified that he did not believe the rumors. Plant Superintendant Hensley testified that he found the employees unconcerned about the rumors. We find that the administrative law judge properly rejected the company's position and correctly characterized the interrogations as coercive. Therefore, we affirm the Board's conclusion that the interrogation of Randle and Stephens violated § 8(a)(1) of the Act.

As to Kenneth Hertz's employment interview, the administrative law judge found that the company used the interview coercively in violation of § 8(a)(1) of the Act to dissuade Hertz from joining the union. Clear Pine now argues that this finding is unsupported by the record and contradicted by the fact that Lockyear did not expressly threaten Hertz during the interview.

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We disagree. While the testimony of both Hertz and Lockyear was vague, Hertz's testimony does support the conclusion that Lockyear's questioning carried with it the clear implication that the answers given by Hertz affected his chances of employment. W.A. Sheaffer Pen Co. v. NLRB, 486 F.2d 180, 182 (8th Cir. 1973); NLRB v. Bighorn Beverage, No. 78-2995, slip op. at 2306 (9th Cir. March 10, 1980). The administrative law judge credited Hertz's version of events and since the administrative law judge had the benefit of observing the witness's demeanor, we can reverse only if a clear preponderance of the evidence convinces us that he was incorrect. NLRB v. Broadmoor Lumber Co., 578 F.2d 238, 241 (9th Cir. 1978). Because we find it reasonable to infer coercion when a personnel manager urges a prospective employee not to join the union, we affirm the Board's conclusion that the company violated § 8(a)(1) in this instance. The absence of express threats by the company does not alter that conclusion. See NLRB v. Ayer Lar Sanitarium, 436 F.2d 45, 49 (9th Cir. 1970).

Next the administrative law judge found that the company's reprimand of Darlene Forseth violated §§ 8(a)(1) and (3) of the Act in that the company deliberately attempted to discourage union activity by disciplining Forseth, an active and visible union member. Under § 8(a)(3) an employer may not discriminate against an employee because of the employee's union activities or sympathies. The employer's purpose in discriminating, however, is controlling. Without a finding of anti-union animus, there is no unfair labor practice unless the

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conduct was so inherently destructive of employee rights that the unavoidable and foreseeable consequences of the employer's conduct bear their own indicia of motive. NLRB v. Triumph Curing Center, 571 F.2d 462, 474 (9th Cir. 1978). Moreover, the determination of motive is particularly within the purview of the Board. NLRB v. Fort Vancouver Plywood Co., 604 F.2d 596, 600 (9th Cir. 1979). In determining motive, the Board may rely on circumstantial as well as direct evidence, and its inferences and findings must prevail where they are reasonable and supported by substantial evidence. Folkins v. NLRB, 500 F.2d 52, 53 (9th Cir. 1974).

Despite Clear Pine's contention that the meeting at Hensley's office merely provided an opportunity for the complaining employees, the union, and Forseth to confront each other, evidence of the company's improper motivation is considerable. Lockyear asked Forseth no questions nor did he inform her of the specific incident triggering the reprimand. In fact, at the meeting only employee Chancellor mentioned an incident, one occurring in May when Forseth and Chancellor had discussed the union while returning from a work break. Forseth assumed that the May incident was the basis of the reprimand and refused to sign the warning. In fact, the basis for the reprimand was Forseth's remarks that morning to employee Mary Ann Tooley about the upcoming contract negotiations. Lockyear did not conduct an investigation into the alleged harassment of Tooley nor did he warn Forseth as required by standard company policy. In fact, this was the first written warning Lockyear had ever issued to anyone. Moreover,

Chancellor admitted at the hearing that she had never been harassed by Forseth. Finally, the evidence showed that two other employees had conducted union business while on the job, but had escaped discipline. In light of these facts, it was reasonable for the Board to conclude that Darlene Forseth was reprimanded not because of her alleged harassment, but because of her status as a leading union activist.

§ 8(a)(5) VIOLATION

The union opened contract negotations by a letter dated March 14 containing the union's initial contract demands. The union submitted additional matters for negotiation by a letter dated March 31. Between May 16 and August 1, 1977, when the union struck, the parties engaged in five bargaining sessions.

At the first session on May 16, the union presented the local's contract proposals. These "local openers" generally covered 23 areas of the contract, including wages, pensions, and health and welfare benefits, and the adoption of a union shop clause. The company presented no counterproposals at this meeting.

At the second session on June 9, the union presented the terms of the industry settlement between the International and several large industry employers. The union then requested the company's counterproposal, but the company did not respond. Instead, the company objected to

accepting the industry settlement. It argued that its operations differed from the integrated wood products companies that had signed the industry contract. The company maintained that its actual competitors were other moulding operations in Northern California whose contracts did not expire until fall of 1977, and it suggested postponing contract negotiations until those California companies signed their new contracts. The union emphasized that it wanted to bargain immediately and demanded to know if the company was unwilling to negotiate until August. The company said it would negotiate, but that it would not be the first to sign a contract since it had signed first in 1975 and had suffered as a consequence.

At the third bargaining session on June 24, the union again asked for wage proposals, but the company presented none, emphasizing the unfair position in which it had been placed. The union reassured the company that it did not intend to hold the company to the industry settlement, but that it expected some concrete company proposals.

Clear Pine did express its dissatisfaction with the union's proposed health and welfare premium rates which were linked to the industry settlement. The company was willing to pay the premiums at the current rates although it was uncertain whether the health and welfare trusts would accept those lower payments. The company did not, however, indicate that it intended to discontinue all payments to the trusts.

At this meeting the parties also discussed whether the

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contract had actually terminated or whether it was open for modification only. The union, concerned about its flagging membership and recent employee resignations, suggested that the contract remain in effect until impasse. This was rejected by the company who instead suggested an interim agreement that would expire after other moulding companies in Northern California had settled their contracts with the union. Finally at the meeting the union said it was willing to discuss any proposal offered by the company.

At the fourth meeting on July 8, the union again asked for the company's proposals, but none were forthcoming. The company did tell the union that the health and welfare trusts would not accept the premium payments the company had tendered at the lower rates. After a recess, Clear Pine finally presented a written proposal for an interim agreement with a letter stating that the California contracts would not be renegotiated until September. The proposal provided for the continuation of the prior agreement for 60 days and thereafter until either party gave 10 days notice. In addition, any negotiated wage increases would be retroactive to June 1, 1977.

After a caucus, the union rejected the ten day termination clause, the absence of any provision regarding the health and welfare trusts and the absence of assurances of a union security clause in the long-term agreement. It asked the company for an economic proposal since the interim proposal did not contain an economic offer. The company presented nothing further and the meeting adjourned.

On July 10, the union held a membership meeting and told its members that the company had failed to make an economic offer. The membership discussed the matter, voted strike authorization at the discretion of the bargaining committee, and rejected the proposed interim agreement. The union shop question did not emerge as a strike issue.

At the fifth meeting on July 26, the company said it would not pay the industry health and welfare premiums and that it was investigating other plans, including one equal to the present plan. The company did not explain its position any further nor did it express an intention to cease its contribution to the existing plan. It did modify its interim contract proposal and offered to continue remitting the lower premiums to the health plan and to consider another carrier supplying the same benefits.

The union presented a seven point counteroffer which the parties discussed and the company rejected. The union also withdrew its demand for a union shop clause in the long-term agreement. The company did not offer any economic proposals and the meeting ended subject to call by the Federal Mediation and Conciliation Service.

Three days later the union negotiating committee voted to strike because the company had failed to make any economic offers. The strike began on August 1. Eighty-eight employees were absent from work. By August 15, all of the strikers had been replaced. The strike ended November 28 when the union unconditionally offered to

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return to work.

Further bargaining sessions on August 2 and September 2 proved unproductive. On October 14, the company finally presented a package proposing an 8% wage increase and the purchase of a health and welfare plan equivalent to the existing union plan. The company had, however, already implemented a health and welfare plan through Aetna, effective October 1, without notifying the union.

The Board found that the company's refusal to present an economic offer until its competitors had negotiated their contracts was a refusal to bargain in good faith in violation of §§ 8(a)(1) and (5). The Board also found that the company's unilateral implementation of the Aetna plan without notifying the union violated §§ 8(a)(1) and (5) of the Act. The Board concluded that Clear Pine's bad faith bargaining directly caused the August 1 strike and that the striking employees were, therefore, unfair labor practice strikers. The Board ordered the company to cease and desist its unlawful behavior, to bargain in good faith with the union, and to offer full and immediate reinstatement to all strikers who had not yet been reinstated. Finally, the Board ordered the company to make whole any employee who lost money because of the company's unilateral implementation of the Aetna health and welfare plan.

1. Amendment of the Complaint

Initially we must dispose of the company's contention that the administrative law judge erred when he allowed the

general counsel to amend the complaint to allege new violations based on the unilateral change in the health and welfare plan.

It is settled that the Board may find an unfair labor practice when the issue has been fully litigated even though it has not been specifically pleaded in the complaint. NLRB v. International Association of Bridge, Structural and Ornamental Iron Workers Local 433, 600 F.2d 770, 775 (9th Cir. 1979). The Board may either render a decision upon the issues actually tried or order an amendment to conform with the proof. Alexander Dawson, Inc. v. NLRB, 586 F.2d 1300, 1304 (9th Cir. 1978). Here the administrative law judge adjourned the hearings for six weeks to enable Clear Pine to meet the new allegation. Clear Pine had the opportunity to prepare its defense, and the issue was fully litigated. We, therefore, find no error in the judge's decision to allow the amendment of the complaint.

2. Dilatory Bargaining

Section 8(d) of the Act requires an employer and the employee representative to "confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . ." 29 U.S.C. § 158(d). Collective bargaining is mandatory as to subjects that fall within the statutory language of 8(d). Chemical Workers, Local 1 v. Pittsburgh Plate Glass, Co., 404 U.S. 157, 185-186 (1971). The parties need not bargain, however, over subjects that fall outside the statutory mandate. See NLRB v. Cheese

Barn, Inc., 558 F.2d 526, 529 (9th Cir. 1977).

While a union and employer may agree voluntarily not to bargain until the conclusion of negotiations involving competitors, an employer violates §§ 8(a)(5) and (1) by refusing unilaterally to bargain until his competitors complete their negotiations. See United Mine Workers v. Pennington, 381 U.S. 657, 666-67 (1965). Moreover, good faith bargaining presupposes a desire to enter ultimately into a collective bargaining contract. While this duty does not require an agreement, it does prohibit mere pretense at negotiations with a closed mind and without a spirit of cooperation and good faith. NLRB v. Holmes Tuttle Broadway Ford, Inc., 465 F.2d 717, 719 (9th Cir. 1972).

An intent to frustrate and delay meaningful bargaining is evidenced by an unreasonable delay in making a counteroffer. NLRB v. West Coast Casket Co., 469 F.2d 871, 874-75 (9th Cir. 1972). Lack of good faith in bargaining is also manifested by a unilateral change in a term or condition of employment. Alfred M. Lewis, Inc. v. NLRB, 587 F.2d 403, 408 (9th Cir. 1978).

Oftentimes it is difficult to determine whether an employer's conduct amounts to hard bargaining or an unwillingness to bargain in good faith. The validity of any such determination depends in part on an understanding of the collective bargaining process. Therefore, the Board's determination as to a party's bargaining bad faith, if supported by substantial evidence, must stand. NLRB v.

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Dent, 534 F.2d 844, 846 (9th Cir. 1976).

The company points out that at the third meeting on June 24 the parties discussed new job classifications, vacation pay, the health and welfare plan, and retroactivity of any wage increases to June 1, 1977. At the fifth meeting on July 25, the company agreed to all but two of the union's terms for an interim agreement. Moreover, at the meeting on August 2, the company responded to a new union proposal by offering to discuss a long-term contract or another interim agreement. This progress, Clear Pine contends, belies the finding that it did not present economic proposals.

We find Clear Pine's arguments unpersuasive. Without evaluating the merits of the substantive terms of the collective bargaining proposals, it is still apparent that Clear Pine never made specific economic proposals until October 14, five months after negotiations commenced and shortly after the Northern California companies had signed their contracts. In fact, the employer made no proposals except for a sketchy interim agreement which, it later admitted, it knew would be unacceptable. It is true that the company discussed the union's various proposals, but it never presented concrete counterproposals when requested to do so. Rather, it complained of having to negotiate prior to its competitors. The negotiations on an interim agreement did not justify the company's refusal to propose terms for the long-term contract. The parties never agreed to postpone negotiations on the long-term contract and indeed the union requested company proposals at every

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meeting without success. In light of the above, there is substantial evidence to affirm the Board's findings that the company violated §§ 8(a)(5) and (1) by its dilatory bargaining.

3. Unilateral Health Plan Changes

As long as the bargaining obligation is not extinguished, the company has a continuing duty to bargain without instituting unilateral benefit changes, even after expiration of the prior agreement. NLRB v. Sky Wolf Sales, 470 F.2d 827, 830 (9th Cir. 1972). Health care plans are mandatory subjects of bargaining and § 8(a)(5) is violated by an employer's unilateral changes in these plans. NLRB v. Sir James, Inc., 446 F.2d 570 (9th Cir. 1971); Hinson v. NLRB, 428 F.2d 133, 136 (8th Cir. 1970).

The company makes three arguments. First it asserts that the change was not unilateral because the union had notice. The record reflects, however, that although the parties talked about the trusts' refusal to accept lower premiums, the union insisted upon the adoption of the industry settlement and the company, without notice, actually implemented the Aetna plan. Second, the company argues that it was entitled to act because it had bargained to impasse with the union. It is hard to understand, however, how the company could bargain to impasse when it never apprised the union of the terms of the Aetna plan. See NLRB v. Sky Wolf, 470 F.2d at 830. Moreover, the company's dilatory bargaining in refusing to submit a concrete economic proposal to the union precludes the

existence of an impasse. NLRB v. Pacific Grinding Wheel Co., Inc., 572 F.2d 1343, 1349 (9th Cir. 1978).

The company's final argument is that the plans were identical so that there was no material change. This, however, is not established in the record. General Manager Turner testified that he did not know if the plans were equivalent, although others had told him they were. The union maintains that the plans are not identical. Thus, although in Connecticut Light and Power Co. v. NLRB, 476 F.2d 1079 (2d Cir. 1973), the Board excused an employer who changed plans, that relief was based on a specific showing that the plans were, in fact, identical. There is no such showing here. We recognize that the company was placed in a tight spot by the health and welfare trusts' eventual refusal to accept contributions that did not meet the industry settlement. To preserve any health coverage for its employees, Clear Pine had to make a decision. We cannot, however, condone Clear Pine's conduct in offering to negotiate about a plan that it had, in fact, already unilaterally adopted. Nothing precluded Clear Pine from presenting a detailed plan to the union and bargaining, if necessary, to impasse on the issue. Unfortunately, the company chose instead to act alone. We find sufficient evidence in the record to affirm the Board's conclusion that Clear Pine violated §§ 8(a)(5) and (1) by its unilateral implementation of the Aetna plan.

BARGAINING ORDER

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Clear Pine argues that the bargaining order is inappropriate because the union had lost majority status and because the union had directed a campaign of violence and intimidation against employees. We reject both arguments.

1. Loss of Status

This circuit has held that an employer who believes that a union may have lost majority status should properly petition the Board in that regard; in the interim, the employer is not permitted to refuse to bargain or otherwise engage in unfair labor practices. NLRB v. Triumph Curing Center, 571 F.2d at 478; NLRB v. Lee Office Equipment, 572 F.2d 704, 707 (9th Cir. 1978). Moreover, it is reasonable to infer that Clear Pine might have caused the decline in union membership through its own unfair labor practices. Reasonable doubt as to majority status must only be asserted in good faith and may not be raised in the context of an employer's activities aimed at causing disaffection from the union. NLRB v. Sky Wolf Sales, 470 F.2d at 830. As this court recently stated, "It would be inequitable to allow the Company to raise the issue of the Union's majority status when the Company has actively attempted to destroy that status. To allow this defense would be to condone the independent unfair labor practices." NLRB v. B.C. Hawk Chevrolet, Inc., 582 F.2d 491, 495 (9th Cir. 1978). In light of the employer's unfair labor practices outlined above, we reject the company's argument.

2. Union Violence

There were some acts of violence during the strike that resulted in a state court injunction on September 7, 1977, restraining the union from further such activities. Clear Pine asserts, therefore, that the Laura Modes doctrine prevents enforcement of the bargaining order.

This court discussed the Laura Modes doctrine in NLRB v. Triumph Curing Center, 571 F.2d at 475:

> [W]here a union evidences total disinterest in enforcing its rights through the peaceful legal process provided by the Act and instead resorts to violence, the Board will refuse to issue a bargaining order, even though the employer violated the Act.

Quite simply, the Board found insufficient evidence in the record to invoke the Laura Modes doctrine. We agree. The record does not reflect that the union was foregoing the "peaceful, legal process."

CONCLUSION

The Board correctly applied the law and substantial evidence on the record as a whole supports its findings of fact. We affirm the Board's Decision and Order. The Petition for Enforcement is granted. The Board will prepare and submit an appropriate form of judgment.

AFFIRMED

FI-85-12-8-78

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOTICE OF ENTRY OF JUDGMENT

Judgment was entered in this case as of the file stamp date on the attached decision of the court.

Petition for Rehearing (FRAP 40)

A petition for rehearing may be filed within 14 days from the entry of judgment. A petition should not be filed in order to reargue the case but should only be filed to direct attention to material facts of law possibly overlooked in the decision. The 15 page limit allowed by the rule must be observed. In addition, 3 copies of the petition are required unless the petition includes a suggestion for rehearing en banc (in such instances 24 copies are required in addition to the original). The petition should of course be directed to the Clerk of the Court. A petition for rehearing must be submitted on 8 1/2 x 11 inch paper, must show complete proof of service to all parties, and the original must contain an original signature of the counsel/pro per litigant submitting the petition.

Bill of Costs (FRAP 39)

See Rule 39 of FRAP for information as to which party is allowed costs on appeal. If a party is allowed costs, the bill of costs must be filed within 14 days from the entry of judgment. Objections to the bill of costs by an adversary party must be filed within 7 days thereafter.

Issuance of the Mandate (FRAP 41)

The mandate is the certified copy of the judgment. The mandate is scheduled to be issued 21 days from the entry of judgment unless the court directs otherwise. A timely petition for rehearing will stay the issuance of the mandate. If the petition is denied, the mandate will be entered 7 days later. A direct motion for stay of mandate must be filed in an original plus three copies.

Petition for Writ of Certiorari

For information concerning the filing of this petition, refer to the rules of the Supreme Court of the United States.

CA9-086 (9/17/79)

APPENDIX C.

ORDER OF THE COURT OF APPEALS

Before: KENNEDY and PREGERSON, Circuit Judges, and BONSAL,* District Judge

Petitioner's petition for rehearing is hereby denied.

FILED

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RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

APR 28 1981
ALEXANDER L. STEV

No. 80-1461

In the Supreme Court of the United States

OCTOBER TERM, 1980

CLEAR PINE MOULDINGS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supports the Board's findings that petitioner failed to bargain in good faith with the union by engaging in dilatory tactics in order to delay reaching agreement until its competitors had reached a wage settlement and by unilaterally changing its health and welfare insurance plan.

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 632 F.2d 721. The decision and order of the National Labor Relations Board (Pet. App. A) are reported at 238 N.L.R.B. 69.[1]

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[1] Since petitioner's appendix is not consecutively numbered, "A1-A3" will refer to the decision and order of the Board, and "JD1-JD26" will refer to the decision of the administrative law judge (both reproduced as Appendix A to the petition). "B1-B19" will refer to the opinion of the court of appeals.

JURISDICTION

A petition for rehearing was denied on November 24, 1980 (Pet. App. C). The petition for a writ of certiorari was filed on February 20, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

One relevant provision of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, is set out in the petition (Pet. 3). In addition, Section 8(d), 29 U.S.C. 158(d), provides in pertinent part that:

> * * * to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement * * *.

STATEMENT

1. The last of a series of collective bargaining agreements between petitioner and the Union[2] was due to expire on June 1, 1977 (Pet. App. JD2).[3] On March 14, the Union sent its initial new contract demands to petitioner. Between May 16 and August 1, when the Union struck, the parties engaged in five bargaining sessions (*id.* at JD3, JD9).

At the June 9 bargaining session, petitioner explained that its competitors were other moulding companies in Northern California, which had collective bargaining agreements that did not expire until August, September or October 1977. It suggested postponing contract negotiations until those companies had signed new contracts. The Union emphasized that it wanted to bargain immediately and demanded to know if petitioner were unwilling to negotiate until its competitors signed contracts. Petitioner indicated that it would negotiate, but that it would not be the first within its industry to sign a contract since it had "been a leader" in 1975 and had suffered a competitive disadvantage as a consequence (Pet. App. JD9-JD11 & n.7). At subsequent bargaining sessions, petitioner continued to complain about the unfair position in which the Union was placing it. At the June 24 session, petitioner suggested an interim agreement that would expire after its competitors had reached agreement with their unions. The Union responded that it wanted to negotiate with petitioner, not its competitors, but said

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[2] International Woodworkers of America, Local No. 3-200, AFL-CIO.

[3] All dates referred to hereinafter were in 1977.

that it was willing to discuss any proposal offered by petitioner (*id.* at JD11-JD12).

At the next bargaining session, held on July 8, petitioner submitted an interim proposal, which was rejected by the Union. That interim proposal provided, *inter alia*, for a renewal of the prior agreement for 60 days and thereafter until either party gave 10 days written notice of termination and that all general wage increases negotiated would be retroactive to June 1 (Pet. App. JD12-JD13). A modified interim proposal was rejected by the Union on July 26 (Pet. App. JD13-JD14). Throughout the negotiations, however, petitioner refused to make any proposal on economic issues, notwithstanding the Union's repeated requests that it do so (*id.* at JD14, JD17).

On October 14, petitioner finally presented a proposal of an 8% wage increase and the purchase of a health and welfare plan equivalent to the former plan. Petitioner, however, already had implemented the latter proposal by purchasing a health and welfare plan from Aetna, effective October 1, without notifying the Union (Pet. App. JD14-JD15).[4]

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[4] At prior bargaining sessions the Union had proposed increasing the health and welfare and pension rates to those provided for in the Timber Operators Council, Inc.—IWA Health and Welfare and Pension Trusts (TOC-IWA trusts), to which petitioner had been contributing under the prior agreement. Petitioner refused to contribute at the new, higher levels (Pet. App. JD11, JD13-JD14).

During the course of the bargaining sessions, petitioner and the Union ascertained that the TOC-IWA trusts would not continue to accept contributions at the prior levels (Pet. App. JD12-JD13). In response to that fact, petitioner unilaterally purchased the new plan from Aetna (*id.* at JD15).

2. The administrative law judge found (Pet. App. JD17) that petitioner "with the purpose of delaying an agreement until it could get a reading on the wage settlements which were expected to be reached by its Northern California competitors during the late summer and fall of 1977 * * * engaged in dilatory, surface bargaining with the Union." In so finding, the ALJ noted (*id.* at JD19) that petitioner "never made an economic offer until October 14," at which "point a sufficient amount of time had passed so [petitioner] could see what had occurred in Northern California." The ALJ found that, after the Union rejected petitioner's request that bargaining be put off until after the Northern California settlements, petitioner insured that result by stalling on responding to the Union's proposals and using up time by proposing an interim contract that it knew the Union would reject (*id.* at JD17-JD19).

Concerning the unilateral purchase of a new insurance plan, the ALJ rejected petitioner's assertion that a bargaining impasse over the provision, entitling it to act unilaterally, had been reached (Pet. App. JD20-JD21). The ALJ also noted that, "[d]espite [General Manager] Turner's belief that coverage offered by the private carrier is identical to that previously offered by TOC-IWA, he conceded that he did not know whether that was exactly true" (*id.* at JD15).

The Board, adopting the "rulings, findings, and conclusions" of the ALJ, found that petitioner had violated Sections 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by refusing to bargain in good faith with the Union until petitioner's competitors had agreed upon wage settlements with their em-

ployees and by unilaterally changing its health and welfare insurance plan (Pet. App. A1-A2; JD23-JD24).[5]

3. The court of appeals upheld the Board's findings and enforced its order (Pet. App. B19). The court stated as follows (Pet. App. B14):

> While a union and employer may agree voluntarily not to bargain until the conclusion of negotiations involving competitors, an employer violates §§ 8(a)(5) and (1) by refusing unilaterally to bargain until his competitors complete their negotiations. *See United Mine Workers* v. *Pennington*, 381 U.S. 657, 666-67 (1965). Moreover, good faith bargaining presupposes a desire to enter ultimately into a collective-bargaining contract. While this duty does not require an agreement, it does prohibit mere pretense at negotiations with a closed mind and without a spirit of cooperation and good faith.

The court of appeals found that substantial evidence supported the Board's finding that petitioner had engaged in such a pretense in order to postpone bargaining until its California competitors had negotiated their agreements. In so finding, the court, as had the Board, rejected petitioner's claim that the progress it had made in negotiations, particularly

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[5] The Board also found that petitioner's bad faith bargaining directly caused the Union's strike and that employees who engaged in the strike were therefore unfair labor practice strikers; that petitioner had violated Sections 8(a)(3) and (1) by discriminatorily reprimanding an employee, and Section 8(a)(1) by interrogating two employees about their reasons for joining the Union and by threatening a third with adverse treatment should he join the Union (Pet. App. A1-A2; JD23). The court of appeals upheld these findings (Pet. App. B2-B8), and petitioner does not challenge them here.

concerning the terms of the interim agreement, "belie[d] the finding that it did not present economic proposals" (Pet. App. B15). The court explained (Pet. App. B15-B16):

> Without evaluating the merits of the substantive terms of the collective bargaining proposals, it is still apparent that [petitioner] never made specific economic proposals until October 14, five months after negotiations commenced and shortly after the Northern California companies had signed their contracts. In fact, the employer made no proposals except for a sketchy interim agreement which, it later admitted, it knew would be unacceptable. It is true that the company discussed the union's various proposals, but it never presented concrete counterproposals when requested to do so. Rather, it complained of having to negotiate prior to its competitors. The negotiations on an interim agreement did not justify the company's refusal to propose terms for the long-term contract. The parties never agreed to postpone negotiations on the long-term contract and indeed the union requested company proposals at every meeting without success.

The court of appeals further agreed that the Company's unilateral implementation of the Aetna plan was unlawful, in light of the absence of record evidence that the new plan was identical to the old one. As the court stated (Pet. App. B17):

> We recognize that the company was placed in a tight spot by the health and welfare trusts' eventual refusal to accept contributions that did not meet the industry settlement. To preserve any health coverage for its employees, [petitioner] had to make a decision. We cannot, how-

ever, condone [petitioner's] conduct in offering to negotiate about a plan that it had, in fact, already unilaterally adopted.

ARGUMENT

1. Sections 8(a)(5) and 8(d) of the Act, 29 U.S.C. 158(a)(5) and 158(d), require an employer to bargain "in good faith" with the chosen representative of its employees with respect to hours, wages, and other terms and conditions of employment. In determining whether an employer has met that obligation, the Board is to consider, among other factors, whether the employer's "conduct at the bargaining table evidences a real desire to come into agreement." *NLRB* v. *Insurance Agents' Union*, 361 U.S. 477, 498 (1960); accord, *NLRB* v. *American National Insurance Co.*, 343 U.S. 395, 402 (1952) ("performance of the duty to bargain requires more than a willingness to enter upon a sterile discussion of union-management differences"). More specifically, this Court has made clear that an employer violates the Act by refusing to bargain " 'because he envisions competitive disadvantages accruing from such bargaining' " or by conditioning bargaining on the prior conclusion of agreements by his competitors. *United Mine Workers* v. *Pennington*, 381 U.S. 657, 667 (1965), quoting *American Range Lines, Inc.*, 13 N.L.R.B. 139, 147 (1939).

Petitioner's contention (Pet. 15-17) that an employer may lawfully insist upon a delay in making an economic offer in order to protect its competitive position is without any case support. The authorities cited by petitioner establish only that a party may lawfully insist upon a proposal that its wages and benefits will be identical to those at another plant

(*General Teamster, Local 126*, 176 N.L.R.B. 406, 407-408 (1969)), or a proposal that its wages and benefits will be adjusted automatically if the union agrees to lower rates with another employer (*Dolly Madison Industries, Inc.*, 182 N.L.R.B. 1037, 1038 (1970)). However, a party cannot condition bargaining upon a review of its competitors' contract settlements. *United Mine Workers* v. *Pennington, supra.* Here, petitioner did not propose to tie its wage increases to those negotiated by its competitors nor did it agree to a wage increase subject to adjustment later. Instead, it delayed making any economic offer for approximately five months in order to protect its competitive position.

Nor is petitioner's deliberate delay in making an economic offer analogous to a refusal to agree to any wage increase (Pet. 10). Whether an employer's adamance with respect to a specific clause is evidence of bad faith or mere hard bargaining is a factual question to be resolved in light of all the surrounding circumstances. *NLRB* v. *Herman Sausage Co.*, 275 F.2d 229 (5th Cir. 1960).[6] Here, however, the court found (Pet. App. B15) that petitioner's tactics themselves were unlawful, without regard to the merits of the proposals' substantive terms. Delay itself is clear evidence of an intent to frustrate meaningful bargaining See *Continental Insurance Co.* v. *NLRB*, 495 F.2d 44, 48 (2d Cir. 1974).[7]

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[6] Contrary to petitioner's representation (Pet. 10), in *NLRB* v. *Herman Sausage Co., supra,* the Fifth Circuit did enforce the Board's order holding that the employer had violated 29 U.S.C. 158(a)(5) and (1) by refusing to bargain in good faith.

[7] *NLRB* v. *Cummer-Graham Co.*, 279 F.2d 757 (5th Cir. 1960), is not to the contrary, since in that case the Fifth

Petitioner urges that it did in fact make certain economic proposals (Pet. 9-10), that its proposal of an interim agreement demonstrated good faith (Pet. 12-13), and finally and "significantly" (Pet. 15), that it did not insist on, but instead merely proposed, tying its offer to future settlements elsewhere. The Board's and the court of appeals' rejection of this view of the record and petitioner's bargaining tactics presents only an evidentiary issue that does not warrant review by this Court. *NLRB* v. *American National Insurance Co.*, *supra*, 343 U.S. at 409-410; *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). In any event, as shown in the Statement, *supra*, the record amply supports the Board's findings.[8]

2. Contrary to petitioner's contention (Pet. 13-14), the holding of the court below that petitioner's unilateral selection of a new insurance carrier violated the Act does not conflict with *Connecticut Light & Power Co.* v. *NLRB*, 476 F.2d 1079 (2d Cir. 1973). As the court of appeals observed (Pet. App. B17), in *Connecticut Light & Power Co.* there was a specific showing that the former and replacement plans were, in fact, identical, while in the instant case no such showing was made. Petitioner's assertions (Pet. 8, 13-14)—without record references—that the benefits of the two plans were "exactly the same" raises only a factual issue not appropriate for review by this Court.

Circuit merely held that there was insufficient evidence to support the Board's "finding that there were delaying tactics amounting to refusal by the [employer] to bargain in good faith * * *" (*id.* at 760).

[8] Petitioner's version of the negotiations for an interim agreement (Pet. 5-8) was described by the ALJ (Pet. App. JD18-JD19, JD13 n.9) as a "mischaracterization" of the record.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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